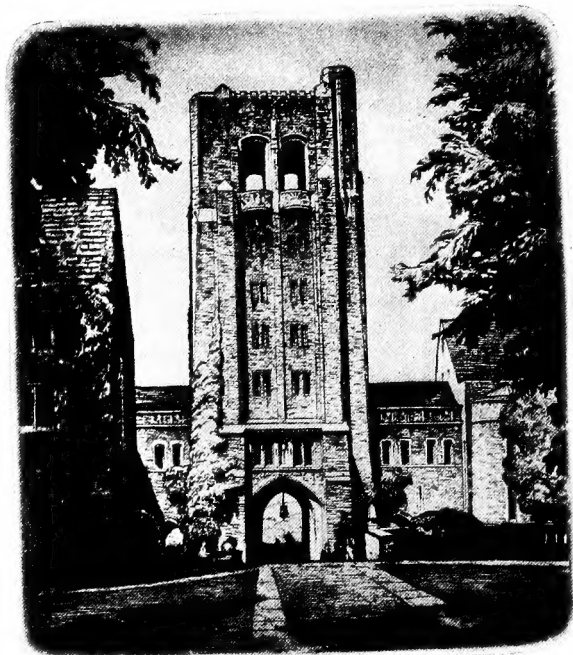




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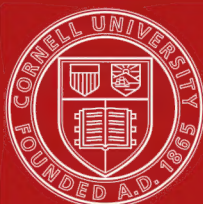
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MR. SERJEANT STEPHEN'S  
COMMENTARIES  
ON THE LAWS OF ENGLAND.  
(PARTLY FOUNDED ON BLACKSTONE.)

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Table of Contents.]

MR. SERJEANT STEPHEN'S  
New Commentaries  
ON THE  
LAWS OF ENGLAND  
(PARTLY FOUNDED ON BLACKSTONE.)

BY  
HIS HONOUR JUDGE STEPHEN.

*"For hoping well to deliver myself from mistaking, by the order and  
"perspicuous expressing of that I do propound, I am otherwise zealous and  
"affectionate to recede as little from antiquity, either in terms or opinions,  
"as may stand with truth, and the proficience of knowledge."*

—LORD BACON, *Adv. of Learning*.

Sixteenth Edition.

UNDER THE GENERAL EDITORSHIP OF  
EDWARD JENKS, ESQ., M.A., B.C.L.,  
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NEW COMMENTARIES  
ON  
THE LAWS OF ENGLAND.

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BOOK IV.

OF PUBLIC RIGHTS—(*continued*).

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PART III.

OF THE SOCIAL ECONOMY OF THE  
REALM.

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WE have now, in our examination of Public Rights, treated successively of the Civil Government and of the Church ; but there are certain other institutions which belong equally to the division of Public Rights. And as these relate immediately to the community at large or to large classes of it, they may without impropriety be comprised under the general name of *Social Economy of the Realm*. Under this head will be included that system of local government, which was brought into existence mainly by statutes of the nineteenth century. And, inasmuch as the various local authorities are for the most part corporations, we shall, after a discussion of the general law of corporations, proceed to municipal corporations and to other local authorities which have been largely modelled upon the municipal code. In this way a description will be given of the local administration of many important public statutes ; and the subject will be concluded by a review of the commercial bodies which are incorporated under the Companies Acts.

## CHAPTER I.

## OF CORPORATIONS IN GENERAL.

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CORPORATIONS are artificial persons, recognized or constituted by the law, and endowed by it with the capacity of perpetual succession. They have been created for various purposes, such as for local government, and for the advancement of religion, of learning, and of commerce.

The original invention of corporations is commonly attributed to the ancient Romans; and however that may be, they were much developed by the Roman civil law, and were recognized also by the canon law, whence our own spiritual corporations are derived.

[Corporations are, with us, either *aggregate* or *sole*. Corporations aggregate consist of many persons united together into one society; of which kind are the mayor, aldermen, and citizens of a city, the dean and chapter of a cathedral church, and the like. Corporations sole consist of one person only and his successors; of which kind are the monarch, all bishops, all rectors or parsons (*a*), and the like. As regards a rector or parson in particular, the endowments of the living are vested in him as for a freehold estate; and this freehold, if vested in him in his natural capacity, would on his death have descended to his heirs, who might or might not have been compellable to convey it to the next incumbent. At the best, the conveyance would have been attended with expense and trouble, to be repeated again and again on every change of incumbent. The law, therefore, has wisely ordained that the parson, *quatenus* parson, shall never die, any

(*a*) Co. Litt. 43 a.

[more than the King ; by making him and his successors a corporation. By which means all the rights of the parsonage are preserved entire to the successor ; for the present incumbent, and his predecessor who lived eight centuries ago, are in law one and the same person. And what was given to the one, was given to the other also.

Again, corporations are either *ecclesiastical* or *lay*. In ecclesiastical or spiritual corporations the members are entirely spiritual persons, such as bishops, parsons, and the like (who are corporations sole), or such as deans and chapters (who are corporations aggregate). Lay or temporal corporations are either *civil* or *eleemosynary* ; those which are erected for temporal purposes (mostly of a commercial character) being called civil, and those which have been created for the perpetual distribution of alms being called *eleemosynary*. Instances of civil corporations are the trading companies (or guilds) of London and other towns, established for the regulation of manufactures and commerce, the Royal College of Physicians, the Royal College of Surgeons of England, the Royal Society, and the Law Society. The Universities of Oxford and Cambridge are also *civil* corporations (a) ; it being clear that they are not *ecclesiastical*, but *lay* corporations, since they are composed of more laymen than clergy, and that they are not *eleemosynary* foundations, though stipends therein are annexed to

(a) *R. v. Chancellor of Cambridge* (1723) 1 Stra. 557 ; *Rex v. Cambridge (Vice-Chancellor)* (1765) 3 Burr. 1656. Under the Oxford University Act, 1854, the government of the university of Oxford is mainly vested in the Hebdomadal Council, a body consisting of twenty-two persons, of whom four are *ex-officio* members (the chancellor, vice-chancellor, and the two proctors), and the other eighteen are elected, viz., six by the heads of houses, six by

the professors, and six by masters of arts of not less than five years' standing. Under the Cambridge University Act, 1856, the government of the university of Cambridge is vested in the Council of the Senate, consisting of eighteen persons, of whom two are *ex-officio* members (the chancellor and the vice-chancellor), and the other sixteen are elected, viz., four by heads of colleges, four by professors, and eight by other members of the senate.

[particular professors ; for such stipends are rewards *pro opere et labore*, as in the case of the salaried officials of ordinary civil corporations. Among *eleemosynary* corporations may be mentioned hospitals for the maintenance of the poor, sick, and impotent ; also, all colleges, both in our universities and out of them, which are founded (1) for the promotion of piety and learning, and (2) for affording assistance to the members, in order to enable them to prosecute their studies. Eleemosynary corporations, though in some things partaking of the nature of ecclesiastical bodies, are lay and not ecclesiastical, even though composed of ecclesiastical persons (a) ; and accordingly, they are not subject to the jurisdiction of the ecclesiastical courts, or to the visitation of the Ordinary (or diocesan) in his spiritual character.

Having thus enumerated the varieties of corporations, we will next proceed to consider—I. how corporations are created ; II. their powers, capacities, and incapacities ; III. how they are visited ; IV. how they are dissolved.

I. Corporations seem to have been created under the civil law by the mere voluntary association of the members, unless the object of the association were contrary to law, in which case the corporation would have been *illicitum collegium* (b). But in England, and according to the English law, the King's consent is absolutely necessary to the erection of any corporation. This consent of the Crown may, however, be either implied or express ; being implied, in the case of corporations which exist by force of the *common law* or by *prescription* (c), and being express, when given either by Act of Parliament or by charter, or by both (d). Thus, the charter of the Royal

(a) *Philips v. Bury* (1694) 1 Ld. Raym. 6. 1871 (34 & 35 Vict. c. 63), the Crown's charter for the foundation of any new college or university is to be laid before  
 (b) Dig. 47, 22, 1.  
 (c) 2 Inst. 330.  
 (d) By the College Charter Act, Parliament for a period of not

[College of Physicians (of the tenth year of Henry the Eighth), was confirmed by the 14 & 15 Hen. VIII. (1523) c. 5 (a); and the corporation of the Bank of England was created by the Crown, under the powers of the 5 & 6 W. & M. (1694) c. 20.] The Crown has at all times exercised the prerogative of granting charters of incorporation to boroughs. But the procedure for obtaining such a charter is now regulated by the Municipal Corporations Act, 1882; and the provisions of that Act are made applicable to all newly created municipal corporations (b).

[The creation by the Crown of a body corporate may be performed by the words *creamus, erigimus, fundamus, incorporamus*, or the like; nay, it has been held, that if the Crown grants to a set of men to have *gildam mercatoriam*, a mercantile meeting or assembly (c), this is also sufficient to incorporate and establish them for ever (d).

When a corporation is erected, a name is always given to it; or, if none is actually given, a name will attach to it by implication (e). And by that name alone, it must sue and be sued and do all legal acts; but a minute variation therein is not material, and, if the corporation be afterwards incorporated by another name, without its identity or capacity in other respects being affected, it does not thereby lose its property or privileges (f). But some name is of the very being of its constitution (g);

less than thirty days before the report of the Privy Council thereon is submitted to His Majesty.

(a) *Dr. Bonham's Case* (1608) 8 Rep. 107.

(b) 45 & 46 Vic. c. 50, part xi.

(c) *Gild* signified among the Saxons a fraternity; and such gilds as were commercial gradually took the shape of our present municipal corporations, with a place of meeting called the *Guild-hall*.

(d) *Sutton's Hospital Case*

(1612) 10 Rep. 30; 1 Roll. Ab. 513.

(e) *Anonymous* (1700) 1 Salk. 191.

(f) *Luttrell's Case* (1601) 4 Rep. 87 a. See the effect of the Municipal Corporations Act, 1882, s. 8; *Ludlow v. Tyler* (1836) 7 C. & P. 537; *Doe v. Norton* (1843) 11 M. & W. 913. As to change of name by limited companies under the Companies Acts, see Companies (Consolidation) Act, 1908, s. 8.

(g) *Gilb. Hist. C. P.* 182.

[for the name of incorporation, says Sir E. Coke, is as a proper name, or name of baptism. And therefore, when a private founder gives his college, or hospital, a name, he does it only as a godfather. And by that same name, the King baptizes the corporation (a).

The Crown has at all times, as we have said, exercised the prerogative of creating corporations by charter or letters patent, and may still do so upon the advice of a responsible Minister. Thus, in 1889, the British South Africa Company was "constituted, erected, and incorporated . . . by our prerogative royal and of our especial grace." But trading corporations are now usually incorporated either by special Acts of Parliament (b), as most of our railway companies have been, or under the powers contained in general Acts of Parliament, of which the most important is the Companies (Consolidation) Act, 1908. That Act, which repeals and re-enacts in the form of a Consolidating Act, the Companies Act, 1862, and many other Acts on the same subject, empowers any seven or more persons to form themselves into an incorporated company for any lawful purpose, by subscribing to a memorandum of association and otherwise complying with the requirements of the Act. A vast number of trading companies have been formed under that Act, or the earlier Companies Acts, whose place it has taken.

II. The principal characteristics of a corporation aggregate, and those which distinguish it from an unincorporated body of persons, and show in what respects it

(a) *Sutton's Hospital Case* (1612) 10 Rep. 28.

(b) Special acts for incorporating companies generally include by reference the Companies Clauses Acts, 1845-1889, and other Clauses Acts appropriate to the objects of the Company, such as the Railways

Clauses Act, 1845, or the Waterworks Clauses Act, 1847 and 1863. By being included in a special Act, the clauses of these Acts are made applicable to the particular company, as if they were enacted in and as part of the special Act.

[resembles and in what it differs from a natural person, are these.

(1.) A corporation aggregate may sue or be sued, implead or be impleaded, grant or receive, and perform any act, by the corporate name, as a natural person may by his individual name.

(2.) A corporation (whether aggregate or sole) is amenable to such judgments as shall be given against it in any action, but in respect only of the corporate property, and not so as to fix the corporators with individual liability (a).

(3.) The acts of a corporation aggregate must, in general, be under its common seal. For, being an invisible body, it cannot manifest its intentions by any personal act or oral discourse; and therefore it acts and speaks only by its common seal, the affixing of the seal, and that only, uniting the several assents of the individual corporators, and making one joint assent of the whole (b).]

This last rule has, however, been considerably modified, both by the relaxations introduced by the decisions of the Courts, and by the legislature. On the one hand, the Courts have long admitted the exception in favour of all corporations aggregate that they may without the use of the common seal do all acts of a trivial and frequently occurring kind and those which by their nature do not admit of delay, for, to require such acts to be done under seal, would defeat the objects for which the corporation is created (c). And, in the case of corporations established for trading purposes, the rule is, that they may without the use of a seal do all things of ordinary occurrence in

(a) *Risdon Iron Works v. Furness* [1906] 1 K. B. 49. The maxim of the civil law is the same: "*Si quid universitati debetur, singulis non debetur; nec quod debet universitas, singuli debent.*" (Dig. 3, 4, 7.)

(b) *Church v. The Imperial Gas*

*Light and Coke Co.* (1838) 6 A. & E. 846, 861; *Arnold v. Mayor and Corporation of Poole* (1842) 4 Man. & G. 860.

(c) *Per Denman, C.J., in Church v. Imperial Gas Light & Coke Co.* (1838) 6 A. & E. 846, 861.

that trade; the seal of the company only being required for matters of an unusual and extraordinary kind (a). In the case of companies incorporated under the Companies Acts, or by special act of Parliament incorporating the Companies Clauses Act, 1845, the legislature has enacted that the company may make without the common seal all contracts which an individual may make orally or in writing without the use of a seal. The seal of the company is only required for contracts of a kind which if made by an individual would have to be under seal (b).

Another exception, applicable alike to trading and to non-trading companies, is, that they are bound by contracts upon an executed consideration to pay for work and labour done, or goods supplied for the purposes of the corporation; even though the order was not given under seal (c). This exception, however, is not applicable to contracts of urban authorities under the Public Health Act, 1875, where the amount or value of the contract exceeds £50; inasmuch as Parliament has expressly enacted that such contracts must be under the common seal of the authority (d).

(4.) A corporation aggregate is, in the eye of the law, a person, wholly distinct from, though composed of, the individuals who make up the corporate body. It is said that it has no mind or body. It follows from this, that it can only act by its agents. So it cannot appear in person in legal proceedings, but must always do so by attorney, *i.e.* by counsel, or by a solicitor in Courts in which solicitors have the right of audience (e). Nor can

(a) *South of Ireland Colliery Co. v. Waddle* (1869) L. R. 4 C. P. 617.

(b) Companies (Consolidation) Act, 1908, s. 76; Companies Clauses Act, 1845, s. 97.

(c) *Lawford v. Billericay R. D. C.* [1903] 1 K. B. 772.

(d) Public Health Act, 1875, s. 174; *Young v. Leamington*

*Corporation* (1883) L. R. 8 App. Ca. 517; *Hoare v. Kingsbury U. D. C.* [1912] 2 Ch. 452.

(e) *In re L. C. C. and London Tramways* (1897) 13 T. L. R. 254. Hence a corporation, when required to give discovery of documents, does so by some officer of the corporation in that behalf appointed by the Court (Order



a corporation be guilty of treason or felony, or of any crime which derives its character from the corrupted mind of the person committing it (*a*). It can however be indicted for misdemeanors which do not depend on the mental condition of the person committing them (such as obstructing a highway); whether the misdemeanor consist of an act of omission or commission (*b*). And a company incorporated under the Companies Acts may be convicted of the statutory offence of selling to the prejudice of the purchaser an article of food not of the nature, substance and quality demanded; for *mens rea* (or guilty knowledge) is not necessary to constitute the offence (*c*). Such a company is also liable to be prosecuted and fined for divers statutory offences under the Companies (Consolidation) Act, 1908 (*d*). And, in civil cases, on the ordinary rules of principal and agent, it has been held responsible for the acts of its servants; even where the act complained of is not actionable without proof of malice (*e*).

(5.) And, as a corporation aggregate sues and is sued, and contracts, as one person, though it is composed of many individuals, so too it holds property as one person, and is capable even of acting as a trustee (*f*). When corporations

xxxi. r. 5; *Berkeley v. Standard Discount Co.* (1879) 13 Ch. D. 97; *Mayor of Swansea v. Quirk* (1879) 5 C. P. D. 106; and a corporation obtains such discovery on the affidavit of its solicitor, where an affidavit is required (*Kingsford v. Great Western Rail. Co.* (1864) 16 C. B. (N.S.) 761).

(*a*) *R. v. G. N. R.* (1846) 9 Q. B. 315.

(*b*) *R. v. G. N. R.*, *ubi sup.*; *R. v. Birmingham* (1842) 3 Q. B. 223; *Whitfield v. S. E. R.* (1858) E. B. & E. 115.

(*c*) *Pearks, Gunston, &c., Ltd. v. Ward* [1902] 2 K. B. 1.

(*d*) See, for instance, ss. 62, 63, 87, 102, and 274.

(*e*) *Nevill v. Fine Arts Co.* [1895] 2 Q. B. 156 [1897] A. C. 68; *Cornford v. Carlton Bank* [1899] 1 Q. B. 392; *Citizens Life Co. v. Brown* [1904] A. C. 423.

(*f*) *Att.-Gen. v. Landerfield* (1743) 9 Mod. 286; *Re Thompson's Trusts* [1905] 1 Ch. 229. Doubts have been entertained whether a corporation aggregate can be an executor; because it cannot take the oath for due performance of the office. This objection does not apply to a corporation sole. (See *Williams, Executors*, 10th edn., p. 158). The Treasury Solicitor, who is a corporation sole, may act as administrator, and the Public

aggregate take *goods and chattels*, they do so for the benefit of themselves and their successors, just as natural persons may for themselves their executors and administrators; but a sole corporation cannot take goods in its corporate capacity, because such moveable property is liable to be lost or embezzled, and would raise a multitude of disputes between the successor and the executor (*a*). So a lease for years granted to a bishop and his successors would go to the executors of the bishop (*b*). Yet if a sole corporation be the representative of a number of persons, *e.g.*, the master of a hospital, or the dean of some antient cathedral, it may take goods in its corporate capacity, equally as a corporation aggregate may do; and a bond to the master or dean, and his successors, is good in law (*c*). A corporation was formerly incapable of holding property as a joint tenant; and a limitation of an estate to a corporation and one individual, or to two corporations, without words of severance, made them tenants-in-common. But this disability has recently been removed by statute (*d*).

Corporations, whether aggregate or sole, may (subject to the Statutes of Mortmain (*e*), and to the limitation we shall next consider) hold land and other real property, and acquire easements, profits, and prescriptive rights, to them and their successors, as natural persons may hold to them and their heirs (*f*). It is said, however, that a corporation cannot hold land by copy of court roll (*g*).

These incidents of bodies corporate do not attach to bodies unincorporate. Thus, the inhabitants of an

Trustee, likewise a corporation, 464.

as executor or administrator  
(Court of Probate Act, 1857, s. 81; Public Trustee Act, 1906, s. 2 (1)).

(*a*) Co. Litt. 46; *Power v. Banks* [1901] 2 Ch. 487.

(*b*) *Ibid.*

(*c*) *Anon.* (1540) Dyer, 48; *Byrd v. Wilford* (1593) Cro. Eliz.

(*d*) Bodies Corporate (Joint Tenancy) Act, 1899; *Re Thompson's Trusts* [1905] 1 Ch. 229.

(*e*) See *ante*, vol. i., pp. 342–349.

(*f*) *Sutton's Hospital Case* (1612) 10 Rep. 30.

(*g*) *A.-G. v. Lewin* (1837) 8 Sim. 369.

unincorporated parish are not capable of holding lands or franchises to them and their successors (a); although in many parishes even lands are vested in trustees in trust for the inhabitants of a parish and are spoken of as belonging to the parish, especially when the instrument of will or gift is lost, and the trustees are not known (b).

And, though a voluntary society of individuals should unite together by mutual agreement for common purposes, should provide a common stock by subscription, and should subject themselves to laws of their own creation for the government of their society, yet all this will not entitle them to the privilege of suing or being sued in their corporate capacity, or protect them from individual liability (c). Indeed, for any persons to assume to themselves the character of a corporation, and to attempt to act and to hold themselves out as such without a charter or statutory authority, is a contempt of the King by usurping on his prerogative; and, by proceedings in *quo warranto*, the wrong-doer may not only be 'ousted,' but may also be fined, which shows that the usurpation is considered as a criminal act (d).

(6.) The powers of every corporation created by statute for particular purposes are, however, limited to those which are expressly or by implication conferred on it by the statutes to which it owes its origin. Any act done by it outside those powers is *ultra vires* and void. Thus, though there is nothing in the nature of a corporation to prevent its holding land or (in the case of a corporation aggregate) personal property, and binding itself by contracts of all kinds, a statutory corporation can only do these things so far as it is within its statutory powers to

(a) *Ashby v. White* (1703) Ld. 147 n.; *In re St. Botolphs*, *ibid.* Raym. 951; S. C., 3 Salk. 18. 142.

(b) See 59 Geo. 3 (1819) c. 12; (c) *Todd v. Emly* (1841) 8 *Ex parte Vaughan* (1867) L. R. M. & W. 505.

2 Q. B. 114; *A.-G. v. Webster* (d) *Duvergier v. Fellows* (1828) (1875) L. R. 20 Eq. 483; *In re* 5 Bing., at pp. 267-8.  
*St. Bride's* (1887) 35 Ch. D.

do them, and will be restrained by the Courts from applying its funds to purposes outside those powers. This rule applies not only to corporations created for purposes of local government, but to trading corporations, whether created by special Act of Parliament or under general Acts, such as the Companies Acts (a). In this respect, such companies differ fundamentally from corporations created by charter from the Crown, which, speaking generally, have all the powers of natural persons (b).

(7.) The powers of statutory corporations to regulate their own affairs, and the mode in which they may lawfully exercise the powers conferred upon them, depend largely on the statutes from which they derive those powers. With regard to corporations aggregate at common law, it is said to be an incident of them that the act of the major part is esteemed the act of the whole; for although, by the civil law, the major part must, at the least, have consisted of two-thirds of the whole (c), yet, with us, any majority is sufficient to determine the act of the whole body (d). It is also incident to such corporations aggregate, to have the power of electing their own members; and when this power is not specially assigned by a charter to a committee of the members, it belongs to the major part of the corporation duly assembled for the purpose, though it may, in general, be delegated by by-law to a select body or committee of the corporators, so long as such delegation be not contrary to the charter regulating the corporation (e).

(a) *Ashbury Railway Carriage & Iron Co. v. Riche* (1875) L. R.

7 H. L. 653; *A.-G. v. Great Eastern Rail. Co.* (1880) 5 A. C. 473; *A.-G. v. London County Council* [1902] A. C. 165.

(b) *Baroness Wenlock v. River Dee Co.* (1883) 36 Ch. D. 675. *A.-G. v. Manchester Corporation* [1906] 1 Ch. 651, *per* Bowen,

L.J., at p. 685.

(c) Dig. 3, 4, 3.

(d) *Grant, Corporations*, p. 68; *Oldknow v. Wainwright* (1760) 2 Burr. 1017; *Rex v. Varlo* (1775) Cowp. 248.

(e) *Rex v. Spencer* (1766) 3 Burr. 1828; *R. v. Ashwell* (1810) 12 East, 22; *R. v. Westwood* (1830) 7 Bing. 1.

III. [We are next to inquire, how corporations may be *visited*. For corporations, being composed of individuals who are subject to human frailties, are themselves likewise so subject. And for that reason the law has provided proper persons to visit them, inquire into their habits, correct irregularities of conduct, and the like.

(1.) As regards *ecclesiastical* corporations, the Ordinary is their visitor. For as the Pope formerly, and now the Crown, as supreme Ordinary, is the visitor of the Archbishop or Metropolitan, so the Metropolitan has the charge and coercion of all his bishops; and the bishops are, within their several dioceses, the visitors of all deans and chapters, of all rectors and vicars, and of all other spiritual corporations (*a*).

(2.) As regards *lay* corporations, of those of the *eleemosynary* kind, the founder and his heirs or assigns are the visitors; for in a lay incorporation the Ordinary cannot visit (*b*). But, if the lay corporation be of the *civil* kind, it has no visitor; for the misbehaviours of all civil corporations are inquired into and redressed, and their controversies decided, in the courts.] Thus, disputes as to the management and conduct of business of trading companies and of municipal and county councils are frequently inquired into in the High Court (*c*).

The duties of a visitor are, generally, to control all irregularities in the institution over which he presides, and to decide and give redress in all controversies arising among the members, as to the interpretation of their laws and statutes (*d*). In the exercise of these duties, he is to be guided by the intentions of the founder; so far as they

(*a*) *Re Dean of York* (1841) 2 Q. B. 1; *R. v. Dean of Rochester* (1851) 17 Q. B. 1.

(*b*) *Sutton's Hospital Case* (1612) 10 Rep. 31 a.

(*c*) *Philips v. Bury* (1694) 1 Ld. Raym. 8; *R. v. Chancellor of Cambridge University* (1723) 1

Stra. 557; *R. v. Vice-Chancellor of Cambridge* (1765) 3 Burr. 1656.

(*d*) *Dr. Lee's Case* (1858) E. B. & E. 863. The visitor's construction of statutes is binding on superior courts. (*A.-G. v. Clare Hall* (1747) 3 Atk. 662, as reported in 2 T. R. 312).

can be collected from the statutes or from the design of the institution. But otherwise, and as regards the course of proceeding, he is restrained by no particular forms (*a*) ; and while he keeps within his jurisdiction, his determinations as visitor are final, and examinable in no other court whatsoever (*b*).

IV. [We come now to consider, how corporations may be dissolved ; this question possessing very considerable importance, because the dissolution is the civil death of the corporation, and the corporate lands and tenements thereupon revert to the person (or his heirs) who granted them to the corporation. For the law doth annex a condition to every such grant, that, if the corporation be dissolved, the grantor shall have again the lands, because the cause of the grant faileth (*c*) ; and further, the debts of a corporation aggregate, either to or from it, are totally extinguished by its dissolution (*d*).]

A corporation created by charter may be dissolved in various ways.

(1.) [By the loss of such an integral part of its members as is necessary, according to its charter, to the validity of the corporate elections ; for in such cases, the corporation has lost the power of continuing its own succession, and will accordingly be dissolved by the natural death of all its members (*e*), unless indeed its resurrection is otherwise provided for by statute.

(2.) By surrender of its franchises into the hands of the King ; which is a kind of suicide.

(3.) By forfeiture of its charter, through negligence or abuse of its franchises ; in which case, the law judges that the body politic has broken the condition upon which it was incorporated, and thereupon the incorporation is

(*a*) *Re Dean of York* (1841)  
2 Q. B. 1.

(*b*) *R. v. Bishop of Ely* (1788)  
2 T. R. 290 ; *R. v. Bishop of  
Worcester* (1815) 4 M. & S. 415.

(*c*) Co. Litt. 13.

(*d*) See *In re Higginson and  
Dean* [1899] 1 Q. B. 325.

(*e*) *R. v. Morris* (1803) 3 East,  
213 ; 4 East, 17.

[void (a). And the regular course, in such case, is to bring an information, in the nature of a writ of *quo warranto* (b), to inquire by what warrant the members now exercise their corporate power; having forfeited it by such and such proceedings. The exercise of this prerogative for the purposes of the State, in the reigns of King Charles the Second and King James the Second, particularly by the revoking of the charter of the City of London, gave great and just offence; and the judgment against the validity of the charter of London was reversed by Act of Parliament after the Revolution, and the franchises of the City of London (it was thereby declared) should never more be forfeited for any cause whatever (c).]

By the Companies (Consolidation) Act, 1908, special machinery is provided for dissolving, or, as it is called, 'winding up' companies registered under that Act, and some other companies to which those provisions are made applicable (d).

(a) *R. v. Ponsonby* (1755) 1 Ves. jun. 8; *Eastern Archipelago Co. v. The Queen* (1853) 2 E. & B. 856.

(b) For proceedings by *scire facias*, see Grant, *Corporations* (1850) p. 295; and for practice since the Judicature Acts, Chitty's

*Archbold's Practice* (13th edn.), p. 934.

(c) 2 W. & M. (1690) c. 8; *R. v. Amery* (1788) 2 T. R. 515; 4 T. R. 122.

(d) 8 Edw. 7, c. 69, ss. 122–273. As to this, see *post*, pp. 256–258.

## CHAPTER II.

OF MUNICIPAL CORPORATIONS, COUNTY COUNCILS, DISTRICT  
COUNCILS, AND PARISH COUNCILS.

## A. MUNICIPAL CORPORATIONS.

A *municipal corporation* was anciently a body politic and corporate, established in a town to promote and protect the interests of the inhabitants. Even before the Norman Conquest, there existed the germ of municipal corporations in this country; it having been frequent for such persons of free condition as were not landowners to settle in the towns, under the name of burgesses, and to occupy houses there, as tenants to the Crown or to some inferior lord, and to form themselves into voluntary associations or fraternities, called *gilds*. In their capacity of burgesses, they were often entitled to certain property, subject to certain burdens, and exempt from certain liabilities. Soon after the Conquest, and from thence downwards to the time of Henry the Sixth, or thereabouts, charters were from time to time conceded, by successive monarchs, to the same towns, and to others; either confirming the former grants, or conferring new grants (a). It was usually an object of ambition with these burgesses to have a *gild-merchant*, and officers—such as mayors, aldermen, bailiffs, and the like—for the government of their towns, and to hold courts of their own, for the administration of justice within their town precincts (b). From about the reign of Henry the

(a) Ellis, *Introduction to Domesday*, vol. i., 191.

(b) Madox, *Firma Burgi*, 28, 116, 136, 139.



Sixth onwards, the charters granted by our different monarchs usually contained express words of incorporation ; as that the mayor, etc., and burgesses of the particular town, should be ' a body corporate ' by the specified name, and by that name should have perpetual succession, and be competent to sue and be sued, and the like (a).

There was, almost necessarily, a very great want of uniformity among the municipalities thus successively created. In many boroughs, the connection of municipal with magisterial offices tainted the administration of justice ; abuses grew up ; and it became necessary in the year 1834 to appoint a Royal Commission to inquire into the existing state of municipal corporations in England and Wales. Acting upon the recommendations of this Commission, Parliament, in the following year, passed an Act " to regulate the municipal corporations in England and Wales " (5 & 6 Will. IV. c. 76), commonly called the ' Municipal Corporations Act, 1835.' The main purpose of this great Act, which is the foundation of our modern system of municipal government, was to separate town management from the administration of justice and parliamentary representation, and to hand over the former to a representative council elected by the whole body of burgesses. Many of the previously incorporated boroughs were mere villages. These were excluded from the Act ; as also were the cities of London and Westminster. As to the remainder, 178 in number, all charters and customs relating to them inconsistent with the Act were repealed ; and a constitution common to all was established.

The Municipal Corporations Act, 1835, continued to regulate these institutions, having been in the meantime

(a) Madox, *op. cit.* 28. (The student cannot be too early warned that the practice of using the term ' corporation,' as equivalent to the borough coun-

cil, is without legal authority, and leads to confusion. The ' corporation ' includes the whole of the burgesses, or persons enjoying municipal rights.)

successively amended by further Acts (a), until the year 1882; when the Act of 1835, and the amending Acts, were repealed, and their provisions consolidated (with further amendments) in the Municipal Corporations Act, 1882. This last-mentioned Act applies (b) to all cities and towns to which the Act of 1835 applied in 1882; that is to say, to the 178 above mentioned, together with several others to which the provisions of the Act of 1835 had in the meantime been extended, under section 141 of the Act of 1835. It has also been extended, and can still be extended, to other towns which have since been incorporated by charter in accordance with its provisions (c). For all such towns a uniform constitution and plan of administration have been provided; under which the inhabitants are incorporated under the name of 'the Mayor, Aldermen, and Burgesses' of the borough, and manage their local affairs by municipal councils of their own election.

It must be remembered, however, that municipal corporations differ materially from purely statutory bodies like county and district councils. The latter derive their powers entirely from Parliament; and those powers are to be found in the Acts by which they are constituted. In the case of municipal corporations, the Act of 1882 does little more than regulate the constitution of the corporations to which it applies. Their administrative powers are derived partly from other general Acts of Parliament, and partly (in many cases) from their charters and local Acts of Parliament. Many boroughs had, before the Act of 1835, or have acquired since, corporate property, franchises, and powers, such as rights to hold and regulate

(a) The prior Municipal Corporation Acts are enumerated in the schedule to the Municipal Corporations (New Charter) Act, 1877 (40 & 41 Vict. c. 69), and also in the schedules to the Municipal Corporations Act, 1882.

(b) 45 & 46 Vict. c. 50, s. 6.

(c) S. 210. See further on this point, Municipal Corporations Act, 1883. For London and the city of London, see *post*, pp. 50–52.

local courts of justice, markets, harbours, and docks, tramways and undertakings for the supply of gas, electricity and water. These franchises and powers they get, not from the Act of 1882, but from old charters or local Acts; and, in some cases, they have by local Acts, powers of paving, cleansing, and policing the town. Moreover, the borough council, acting as urban sanitary authority, now exercises the multifarious powers conferred by the Public Health Acts and other Acts on all urban sanitary authorities (a). The power of controlling the police it derives partly from the Act of 1882, and partly from the Police Acts.

*Cities.*—There is no practical difference between a municipal borough and a city, but the term ‘city’ is one of more dignity. In a city, the burgesses are called ‘citizens;’ and the full name of the corporation is ‘the Mayor, Aldermen, and Citizens.’ It has been said that a city is “a borough incorporate which hath or hath had a bishop;” (b) but this is not strictly accurate. The Crown may by charter or letters patent create any borough a city; and nearly all boroughs which are the sees of bishoprics have been created cities, as also have some which are not (c). In some few instances, the Crown has also granted to the mayor of a city the title of ‘Lord Mayor’ (d). When describing the constitution and powers of cities and boroughs we shall speak of ‘boroughs’ and of ‘mayors’ and ‘burgesses;’ but it will be understood that these terms include respectively cities, Lord Mayors, and citizens.

*Counties of Cities.*—The modern county boroughs created by the Local Government Act, 1888, must be distinguished from ‘counties of cities’ and ‘counties of

(a) See *post*, ch. vi.

(b) Co. Litt., 109 b.

(c) See *Encyclopædia of Local Government*, vol. ii., p. 234; vol. iv., p. 518.

(d) London and York have

long had Lord Mayors. In more recent times, the mayors of Bristol, Cardiff, and some other important cities, have been created Lord Mayors.

towns,' or, as they are sometimes called 'counties corporate.' The latter are certain cities and towns corporate to which the Crown has granted the privilege of being counties of themselves (a). Such grant enables them to appoint their own sheriffs, and exempts them from the jurisdiction of the sheriff of the adjoining county at large. In those boroughs which are counties of themselves, and in the City of Oxford, the council appoints a fit person to be sheriff on the ninth of November in every year; and he holds office until the appointment of his successor (b). Formerly, too, criminal and civil cases arising within such counties of cities and towns corporate could only be tried therein, and before juries drawn therefrom; and some of them still retain this privilege as regards criminal cases (c). In other respects, the constitution and powers of counties of cities and towns are the same as those of other municipal boroughs.

*County Boroughs.*—When county councils were established by the Local Government Act, 1888, a number of the larger boroughs were created 'county boroughs' (d). Some, but not all, of these were already counties of cities or counties of towns. Power was also conferred on the Local Government Board to constitute any borough with a population of not less than 50,000 a county borough (e); and several county boroughs have since been constituted under that power.

County boroughs have all the powers of ordinary municipal boroughs, and, in addition most of the powers

(a) A list of them is set out in s. 61 of the Municipal Corporations Act, 1835. It includes (among others) the counties of the cities of Bristol, Canterbury, Chester, Exeter, Gloucester, Lichfield, Lincoln, Norwich, Worcester, York, and the counties of the towns of Kingston-upon-Hull, Newcastle-upon-Tyne, Nottingham, Poole, and

Southampton.

(b) Municipal Corporations Act, 1882, s. 170.

(c) See 38 Geo. 3, c. 52. Section 10 of the Act reserves this right to Bristol, Chester and Exeter.

(d) Local Government Act, 1888, s. 31.

(e) *Ibid.*, s. 54.

which county councils exercise in counties; and they are practically independent of the councils of the counties in which they are locally situate (a). Their councils and officers are however elected in accordance with the Municipal Corporations Act, 1882, and not as county councils are. They are, in all essentials, municipal boroughs, but with some of the powers of county councils in addition to those which they enjoy as municipal boroughs.

Moreover county boroughs continue to be parts of the counties in which they are situate, for all purposes other than those of local government. Thus, unless they are also counties of themselves, they do not appoint their own sheriffs; and they are not constituted separate counties for the holding of assizes and for the service of jurors and the making of jury lists (b).

*Constitution of Municipal Boroughs.*—A municipal corporation is the body corporate constituted by the incorporation of the inhabitants of a borough (c). Its proper title is 'the Mayor, Aldermen and Citizens' of a city, or 'the Mayor, Aldermen, and Burgesses' of a borough. The body by which it acts is the council elected by the burgesses or citizens (d).

The council has power to exercise all powers conferred on the corporation; but is not itself incorporated (e).

The *burgesses* are those persons who are enrolled on the burgess roll. Every person of full age, whether male or female, is entitled to be enrolled on the burgess roll, and, if so enrolled, to vote, provided he has the necessary qualification, and is not disqualified (f). To be qualified a person must comply with three conditions: (1) occupancy of a building or land of the clear yearly value of ten pounds within the borough, for twelve months preceding

(a) Local Government Act, 1882, s. 7.  
1888, s. 34.

(d) *Ibid.*, s. 8.

(b) *Ibid.*, s. 31.

(e) *Ibid.*, s. 10.

(c) Municipal Corporations

(f) *Ibid.*, ss. 9, 51 and 63.

the 15th of July in any year ; (2) residence in the borough or within seven miles thereof for the same period ; (3) payment of rates, directly or indirectly, for the qualifying property (a).

A person *prima facie* qualified for enrolment as a burgess is disqualified if he is an alien, or has within twelve months received parochial relief or other alms of a like kind, or if he is disentitled to be enrolled by some Act of Parliament (b), such as the Acts which disentitle for a term of years persons who are convicted on indictment for a corrupt or illegal practice committed at a parliamentary or municipal election (c).

The list of burgesses is revised annually by a Revising Barrister, along with the list of persons entitled to vote at parliamentary elections ; and a copy of the revised list, signed by the town clerk, is the burgess roll (d).

*The Council.*—This consists of the mayor, aldermen, and councillors (e). Of these, the councillors only are elected by the burgesses. One-third of the councillors go out of office every year ; and the vacancies are filled by re-election of the retiring councillors, or election of new councillors in their place (f).

In the case of large boroughs, the borough is divided into separate constituencies, called ‘ wards ’ ; in smaller

(a) Municipal Corporations Act, 1882, s. 9. See also Registration Act, 1885 ; County Electors Act, 1888, s. 3, and Poor Rate (Assessment and Collection) Act, 1869, s. 19.

(b) The receipt of medical or surgical assistance from any municipal charity, or treatment in a hospital is not a disqualification (Vaccination Act, 1867, s. 26 (vaccination) ; Medical Relief (Disqualification Removal) Act, 1884, s. 2 (medical relief) ; and Isolation Hospitals Act, 1893 (infectious diseases)). Nor is the

education of the burgess’s child in any public or endowed school (Act of 1882, s. 33). The receipt of private benefactions does not disqualify.

(c) See the Corrupt and Illegal Practices Prevention Act, 1883, ss. 6 and 10, and the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, ss. 2, 7 and 23.

(d) Municipal Corporations Act, 1882, ss. 44 and 45.

(e) *Ibid.*, s. 10.

(f) *Ibid.*, s. 13.

boroughs, there is one election for the whole borough (a). The ordinary day of election is the 1st of November (b). The election is by ballot, as in the case of a parliamentary election; and the Ballot Act, 1872, is made applicable, with some modifications (c).

Any person who at a municipal election is guilty of a 'corrupt practice' (which includes treating, undue influence, bribery, and personation), or an 'illegal practice' (which includes making payments for conveyance of electors to the poll, for the hire of carriages, for bands or banners, employing for payment persons other than the authorized agents, and making false statements in relation to the personal character or conduct of a candidate), may be punished. And the election may be avoided on an election petition, if it is shown that the candidate himself has been guilty of a corrupt or illegal practice, or if the candidate's agents have been guilty of corrupt practices or certain illegal practices, or if there has been general corruption by whomsoever committed (d).

*Qualification of Councillors.*—No person can be elected or be a councillor, unless he is properly qualified and is not disqualified. Any man or woman is qualified to be elected a councillor who is, at the time of election, qualified to elect to the office of councillor, whether actually enrolled as a burgess or not, and who resides in the borough. And a person who is not qualified to elect, is qualified to be elected as a councillor, if he resides within fifteen miles of the borough, and is seised or possessed or rated in respect of property of a certain value in the borough, and is in other respects than that of residence entitled to be enrolled as a burgess (e).

Any person is disqualified for being a councillor who is

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| (a) Municipal Corporations Act, 1882, s. 30.                    | and the Municipal Elections (Corrupt and Illegal Practices) Acts, 1884 and 1911.             |
| (b) <i>Ibid.</i> , s. 52.                                       |  |
| (c) <i>Ibid.</i> , s. 58.                                       | (e) Act of 1882, s. 11. (Women are qualified by the Qualification of Women Act, 1907, s. 1.) |
| (d) See the Corrupt and Illegal Practices Prevention Act, 1883, |  |

disqualified for being enrolled as a burgess on the ground that he is not of full age, or is an alien, or has, during the qualifying period, received union or parochial relief or other alms, or if the rates (including the education rate) in respect of the qualifying property have not been paid (a). Besides these, there are certain statutory disqualifications applicable specially to councillors. The principal of these are :—

(i.) *Bankruptcy*.—A person adjudged a bankrupt is disqualified for five years; unless the bankruptcy is annulled, or he obtains his discharge with a certificate that his bankruptcy was caused by misfortune without any misconduct on his part (b).

(ii.) *Felony*.—A conviction for felony or treason, and a sentence of twelve months hard labour or any longer term, disqualifies a person till he has suffered the punishment or been pardoned or successfully appealed (c).

(iii.) *Office*.—A person is disqualified for election as councillor if he holds any office or place of profit under the council (other than that of mayor or sheriff), or is directly or indirectly interested in any contract or employment with or by the council (d).

(iv.) *Holy Orders*.—Persons in holy orders, and regular ministers of dissenting congregations, are disqualified (e).

(v.) *Absence*.—A councillor becomes disqualified if he is continuously absent from the borough for six months; unless he is absent on service as an officer or soldier of the Auxiliary Forces or of the Reserve Forces on active service, or on service beyond the seas (f).

*Mayor and Aldermen*.—The mayor and aldermen of a borough are elected by the council (g). They may be chosen from among the elected councillors or from other

(a) Act of 1882, s. 11.

Act, 1906.

(b) Bankruptcy Act, 1883, s. 32; Bankruptcy Act, 1890, s. 9.

(e) Act of 1882, s. 12.

(c) Forfeiture Act, 1870, s. 2.

(f) *Ibid.*, s. 39. Members of Local Authorities Relief Act, 1900.

(d) Act of 1882, s. 12; Municipal Corporations (Amendment)

(g) Act of 1882, ss. 60, 61.



persons qualified to be elected councillors (*a*). The mayor is elected annually (usually on the 9th of November), and holds office till his successor is elected (*b*). He may receive such remuneration as the Council thinks fit (*c*). By virtue of his office, he is entitled to preside at meetings of the council, and has precedence in all places in the borough (*d*). He is also, by virtue of his office, a justice of the peace for the borough, and has precedence over all other justices acting in and for the borough, except over a stipendiary magistrate when engaged in administering justice (*e*).

The number of aldermen is one-third of the number of councillors (*f*). They hold office for six years. One-half of their number go out of office every third year; and their places are filled by election. If, as often happens, an elected councillor is chosen as alderman, his seat becomes vacant and has to be filled by the election of another councillor (*g*).

*Meetings of Council.*—The council, so constituted of the mayor, aldermen, and burgesses, must meet once a quarter, and oftener if due notice be given, for the transaction of the general business of the borough (*h*). A majority of the members present (if those present amount to one-third of the whole) may decide every question. The mayor, or the member presiding in his absence, has an original vote, and, in case of equality of votes, a second or casting vote (*i*). The council is the executive of the corporation; and the corporation can only act by its council. And though it may appoint committees of its own body for the regulation and management of any matters, the acts of such committees are inoperative until they have been approved by the council (*k*).

*Officers.*—The officials of the council consist of a town

(*a*) Act of 1882, ss. 14, 15.

(*b*) *Ibid.*, ss. 15, 61.

(*c*) *Ibid.*, s. 16.

(*d*) *Ibid.*, s. 15.

(*e*) *Ibid.*, s. 155.

(*f*) *Ibid.*, s. 14.

(*g*) *Ibid.*, ss. 14, 40.

(*h*) *Ibid.*, s. 22, and Schedule II.

(*i*) *Ibid.*

(*k*) *Ibid.*

clerk, and a treasurer (neither of whom may be a member of the council), and such other officers as have been usual or as are necessary ; and the council has power to fix their salaries (a). Three more officials require notice, viz., the three borough auditors. Two are elected by the burgesses from those who are qualified to be, but are not, councillors ; the other is appointed by the mayor from among the members of the council (b). The accounts of the borough treasurer must be submitted to them half-yearly.

*Expenses of Council.*—The expenses of the council and its officers when exercising the powers of the corporation are payable out of the ‘borough fund’ (c). This fund consists of the rents and profits of all the lands and other properties belonging to the corporation, supplemented by contributions from the Inland Revenue of the proceeds of certain licenses called ‘local taxation licenses,’ collected in the borough (d). If the borough fund is insufficient to defray the expenses payable out of it, the council is empowered to raise the money required by a borough rate (e). In some boroughs, there is power also to raise money by a ‘watch rate’ for the expenses of the borough police (f). The borough fund is applied in or towards the payment of salaries, the expenses connected with the corporate elections, prosecutions, constabulary, prison accommodation, and other specified purposes (g).

The council may also, when in its judgment it is expedient so to do, promote or oppose local and personal Bills in parliament, and prosecute or defend other legal proceedings necessary for the promotion or protection of the interests of the inhabitants, and may apply the borough fund to the costs of so doing. But the expenses of promoting a Bill in parliament cannot be charged to the borough fund, unless incurred in pursuance of a resolution

(a) Act of 1882, ss. 17, 18, 19.

(e) Act of 1882, s. 144.

(b) *Ibid.*, s. 25.

(f) *Ibid.*, s. 197.

(c) *Ibid.*, s. 140.

(g) *Ibid.*, s. 140 ; Sched. V.

(d) See *post*, pp. 39–40.

passed at a meeting of electors held in accordance with the Borough Funds Act, 1903, and approved by the Local Government Board (a).

If the borough fund, without the aid of a rate, is more than sufficient for the purposes to which it is applicable under the Municipal Corporations Act, the surplus is applied, under the direction of the council, for the public benefit of the inhabitants and the improvement of the borough. It may even be applied towards the reduction of the expenses incurred by the council as the urban sanitary authority (b).

The borough accounts are to be regularly audited by the borough auditors, and submitted to the Local Government Board (c). A burgess may take a copy of any order of the council for the payment of money; and an abstract of the treasurer's account is open to the inspection of the ratepayers, and copies may be had by them. The expenses of a county borough acting as education authority (as will be explained later) are also in part payable out of the borough fund.

Any unauthorized expenditure of the borough fund may be restrained by injunction (d); and any order for payment out of the fund may be removed into the King's Bench Division by *certiorari*, and may be wholly or partly disallowed or confirmed, according to the judgment or discretion of the Court (e).

II. *Powers of Municipal Corporations.*—The powers of municipal corporations as such must be distinguished from those which the borough council exercises by virtue

(a) The Borough Funds Acts, 1872 and 1903 (35 & 36 Vict. c. 91 and 3 Edw. VII. c. 14). As to the common law power to oppose bills attacking the existence or property of the corporation, see *A.-G. v. Mayor of Brecon* (1878) 10 Ch. D. 204. The fund raised by rates levied under the Public Health Acts

may not be so used (*Leith v. Leith* [1899] A. C. 508).

(b) Act of 1882, s. 143.

(c) *Ibid.*, s. 28.

(d) *Tynemouth Corporation v. A.-G.* [1899] A. C. 293; *A.-G. v. West Riding Rivers Board* [1905] 3 L. G. R. 764; *A.-G. v. Manchester* [1906] 1 Ch. 643.

(e) Act of 1882, s. 141.

of its being made, by the Public Health Act, the urban sanitary authority for the borough (a).

The Municipal Corporations Act regulates the constitution of the corporation, the election of the council, and the conduct of its business, empowers the corporation for certain purposes, and subject to certain restrictions, to acquire and dispose of land, to borrow money and to raise money by means of a borough rate ; but it gives the corporation but little administrative power. The powers of urban councils (including the councils of boroughs when acting as urban sanitary authority) are explained hereafter ; and we shall only now consider what powers are conferred on borough councils by the Municipal Corporations Act, 1882, as amended by other Acts of the same series.

In the first place, the council may make by-laws for the good rule and government of the borough, and for the suppression of nuisances not already punishable in a summary manner by virtue of any Act in force throughout the borough. Such by-laws must be sent to the Secretary of State ; and may be disallowed by Order in Council (b). They are enforced summarily before justices ; and fines not exceeding five pounds may be inflicted for offences against them. But by-laws which are *ultra vires* (i.e. in excess of the powers of the corporation), or repugnant to the general law (c), or uncertain (d), or unreasonable (e), are invalid. The courts, however, will be slow to hold that a by-law is bad for unreasonableness, and will support it unless it is manifestly partial and unequal in its operation between different classes, or unjust or made in bad faith, or clearly involving an unjustifiable interference with the liberty of those subject to it (f).

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| (a) Public Health Act, 1875,            | K. B. 160.                            |
| s. 6. (As to the powers of urban        | (d) <i>Scott v. Pilliner</i> [1904] 2 |
| sanitary authorities, see <i>post</i> , | K. B. 855.                            |
| pp. 105-111.)                           | (e) <i>Kruse v. Johnson</i> [1898] 2  |
| (b) Act of 1882, s. 23.                 | Q. B. 91.                             |
| (c) <i>Gentel v. Rapps</i> [1902] 1     | (f) <i>Ibid.</i>                      |

Secondly, in respect of corporate property, the common law capacity of corporations aggregate created by charter to hold land as an individual have long been limited by the Mortmain Acts, by which lands assured to a corporation in mortmain without the authority of a license from the Crown or a statute are forfeited to the Crown (*a*). Municipal corporations may, however, purchase or acquire any land with the approval of the Local Government Board (*b*), and, even without such consent, they have statutory authority to purchase land for building a town hall and council chamber, and for sundry other purposes, and, subject to certain restrictions, to accept gifts or devises of land for parks and other public purposes (*c*).

A municipal corporation is also empowered, with the approval of the Local Government Board, to borrow money for the purchase of land, and for erecting on it such buildings as it is empowered to build (*d*). Lands acquired by a statutory corporation under statute must be used for the purposes authorised by that statute, and not otherwise (*e*).

The council may not, except with the approval of the Local Government Board (*f*), sell, mortgage, or alienate the lands or public stock of the borough, or demise such lands for more than a certain term (*g*).

*Police*.—In all boroughs which have a separate borough police force, the constables are appointed and controlled

(*a*) Mortmain and Charitable Uses Act, 1888, s. 1. This does not apply to prevent corporations holding lands on lease for 99 years on shorter terms; such lands not being held 'in mortmain.' (See Tudor, *Charitable Trusts* (4th Edn.), p. 429; *Truro Corpn. v. Rowe* [1901] 2 K. B. 870).

(*b*) Act of 1882, s. 107.

(*c*) Act of 1882, s. 104; Mort-

main and Charitable Uses Act, 1888, s. 5. (A number of other statutes give power to acquire land for specific purposes.)

(*d*) Act of 1882, s. 106.

(*e*) *A.-G. v. Pontypridd U. D. C.* [1905] 2 Ch. 257.

(*f*) Act of 1882, s. 108, as amended by the Local Government Act, 1888, s. 72.

(*g*) Act of 1882, ss. 106, 108.

by a special statutory committee of the council called the 'watch committee' (a). In smaller boroughs, the powers of the watch committee were in 1888 transferred to the county; and such boroughs are now policed by the county police. Other boroughs may, and many do, by arrangement, consolidate their police forces with the county police (b).

*Miscellaneous Powers.*—The council of a municipal corporation has the power of maintaining and repairing bridges within the borough which were formerly repaired by the county; and it may have transferred to it the powers of trustees who were, in many cases, invested by local Acts of Parliament with the powers of supplying in the borough gas and water, of cleansing, watching, and improving the borough, or of providing a cemetery or market. When such transfer is made, the corporation has all the powers conferred by the local Act on the trustees (c).

III. *Administration of Justice.*—The inhabitants of boroughs are of course subject to, and have access to, the ordinary civil courts; but the jurisdiction of magistrates in boroughs requires notice. Some boroughs are within the jurisdiction of the justices of the county in which they are situate; and some are not.

For the Crown may, on the petition of the council, grant to a borough a separate commission of the peace, and assign to any persons His Majesty's commission to act as justices in and for such borough having a separate commission of the peace; provided that such persons reside in, or within seven miles of, the borough, or occupy land in the borough. The borough justices have a jurisdiction within the borough similar to the jurisdiction of the county justices in the county (d). The mayor is *ex-officio* a justice of the borough, and has precedence

(a) Act of 1882, ss. 190, 196. County Police Act, 1840.

(b) *Ibid.*, and Local Government Act, 1888, s. 39 (1); (c) Act of 1882, s. 136.

(d) *Ibid.*, ss. 157, 158.

over the other justices (*a*). He is also a justice of the county within which the borough is situate; unless the borough is a county borough (*b*). The justices of the borough must appoint a justices' clerk; and the council must provide a suitable court-house for them (*c*). The Crown may, on the petition of the council, appoint a stipendiary magistrate for the borough (*d*).

If the borough has not a separate court of quarter sessions, the justices of the county in which it is situate exercise jurisdiction in the borough as fully as they do in the county (*e*). If the borough has a separate court of quarter sessions, the county justices exercise jurisdiction, exerciseable out of quarter sessions, concurrently with the borough justices in the borough, unless the borough was exempt from their jurisdiction before 1835; that is to say, unless the charter of the borough contained a *non intromittant* clause, expressly excluding the county justices (*f*). For the Crown may also, on the petition of the council, grant that a separate court of quarter sessions be holden in and for the borough; and may appoint a recorder of the borough, who sits as sole judge of the Court. The council of a borough having a separate court of quarter sessions appoints a clerk of the peace, and (except in the case of certain smaller boroughs (*g*)) a coroner.

Some boroughs have by charter civil courts of record. Such courts, where they exist, are not deprived in any way of their jurisdiction by the Act of 1882; save as expressly

(*a*) Act of 1882, s. 155; *R. v. Sainsbury* (1791) 4 T. R. 451; *Lawson v. Reynolds* [1904] 1 Ch. 718.

(*b*) Local Government Act, 1894, ss. 22, 21 (3), 35; *Lawson v. Reynolds*, *ubi sup.*

(*c*) Act of 1882, s. 160. See Local Government Act, 1888, s. 35; *R. v. Hunton* (1904) 2 L. G. R. 917.

(*d*) Act of 1882, s. 161. As to his powers, see Stipendiary Magistrates Act, 1858, s. 1; Summary Jurisdiction Act, 1879, s. 20.

(*e*) Act of 1882, s. 154.

(*f*) *R. v. Sainsbury* (1791) 4 T. R. 451; *R. v. Bridgewater* (1839) 10 A. & E. 711.

(*g*) Local Government Act, 1888, s. 38 (2).

therein enacted (a). The recorder is also to be judge of the civil court ; unless such court be otherwise regulated by Act of Parliament (b). The judge may from time to time, with the concurrence of the Rules Committee of the Supreme Court, make rules regulating the procedure of the court (c) ; and, by Order in Council, the provisions of the Judicature Acts, and of the rules made thereunder, may be extended to the court (d).

The Municipal Corporations Act, 1835, while vesting all the corporate property in the corporation, preserved the interests of the ancient *freemen* of the borough in the corporate property, and preserved their rights with regard also to the parliamentary franchise. First, as to the corporate property, it provided, that every inhabitant, and every person admitted a freeman or burgess, and the wife, widow, son, or daughter of any freeman or burgess, and every person married to the daughter or widow of a freeman or burgess, and every apprentice, should respectively enjoy the same share and benefit of the lands and public stock of the borough, as he or she might have enjoyed in case the Act had not been passed ; subject only to this limitation, namely, that the total amount to be divided among such persons should not exceed the surplus which remained after payment of the expenses charged by the Act upon the borough fund (e). Second, as to the parliamentary franchise, the Act provided, that every person who would or might, as a burgess or freeman, have had the right of voting in the election of

(a) Ss. 175-185.

(b) The most important of these borough civil courts, other than the Mayor's Court, London, are the Liverpool Court of Passage; the University Chancellor's Courts ; the Borough Court of Preston and the Salford Hundred Court of Record ; the Tolzey Court and Pie Poudre

Court of Bristol ; the Derby Court of Record ; and the Worcester Court of Pleas. All these are regulated by special Acts.

(c) Act of 1882, s. 182 ; Jud. Act, 1884, s. 24 (47 & 48 Vict. c. 61).

(d) Statute Law Revision and Civil Procedure Act, 1883, s. 8.

(e) Act of 1835, s. 2.



members of Parliament if the Act had not passed, should continue to be entitled to that right (*a*). For the purpose of such reserved rights, the Act required the town clerk of every borough to make out a list, to be called the Freeman's Roll, of all persons admitted burgesses or freemen (*b*), as distinguished from the burgesses newly created by the Act, who were to be entered on another roll, to be called the Burgess Roll. And the Municipal Corporations Act, 1882, has, in effect, continued these provisions (*c*); but their importance has been greatly diminished, owing to the disappearance of the old freemen, and the stringent provisions contained in both Acts on the subject of the acquisition of the 'freedom.'

Before the passing of the Municipal Corporations Act, 1835, the title of burgess (or the 'freedom of the city,' as it was called), was generally acquired by birth, marriage, servitude, gift, or purchase. But that Act provided, that no person should in future be made a burgess or freeman by gift or purchase (*d*); and although, by the Honorary Freedom of Boroughs Act, 1885, the council may confer the freedom of the borough upon distinguished persons, yet this distinction is not to entitle such freemen to vote as burgesses, or to participate in the corporate property of the borough. Moreover, exemptions from such tolls as are levied to the use of the body corporate, and monopolies of exercising any trade, can no longer be claimed by burgesses or others in any borough; and by-laws attempting to create or revive any such privileges are invalid.

### B. COUNTY COUNCILS.

The principle of self-government which (as we have seen) is at the root of the municipal corporation, was extended from the borough to the county, by the Local Government Act, 1888 (*e*); and at the same time the

(*a*) Act of 1835, s. 4; 7 Will.  
4 & 1 Vict. (1837) c. 78, s. 27.

(*b*) Act of 1835, s. 5.

(*c*) Act of 1882, ss. 203–209.

(*d*) Act of 1835, s. 3.

(*e*) 51 & 52 Vict. c. 41.

separation (already effected in boroughs) between town government and the administration of justice, was carried out in county government. Before the passing of that Act, not only were justices of the peace the local administrators of justice; but many of the powers of local government now exercised by county councils were vested in quarter sessions or in justices out of session. Further, in order to work out more effectually the system which the Act established, some material changes have been made in the law of municipal corporations; and the larger boroughs have been raised to the condition of 'county boroughs.'

The Act of 1888 has entrusted to the 'county council' which is elected for every 'administrative county' (a), a number of important functions. It has transferred to it all, or nearly all, the administrative functions which the justices formerly exercised, either in quarter sessions or out of sessions (b); but not any judicial business of the quarter sessions, or of the justices of the county as regards rating appeals, or any other judicial business (c). With regard to the county police, a compromise was adopted; and they have been placed under the joint control of the quarter sessions and the county council, exercised through a standing joint committee (d).

*The Constitution of a County Council.*—The county council is a body corporate, and has perpetual succession and a common seal, and power to hold and acquire land for the purposes of its constitution without license in

(a) An administrative county is the area for which a county council is elected. It is not in all cases the same area as the 'county at large.' Some of the bigger counties (e.g. Yorkshire, Lincolnshire, Sussex, and Suffolk) are divided into several administrative counties, each of which has a separate county

council; and the area of a county borough is not included in the administrative county within which it is geographically situate. (See ss. 46 and 100 of the Act of 1888.)

(b) *Post*, pp. 36–37.

(c) Act of 1888, ss. 8, 78.

(d) *Ibid.* s. 9.

mortmain (*a*) ; but, unlike a municipal corporation, it is a purely statutory corporation, and there is no incorporation of the inhabitants or persons who elect it.

A county council consists of a chairman, aldermen, and councillors (*b*), the aldermen being called 'county aldermen,' and the councillors being called 'county councillors.' The chairman is, by virtue of his office, a justice of the peace for the county (*c*) ; and the clerk of the peace for the county is the clerk of the county council (*d*). The councillors are elected, one for each electoral division, by the county electors. The qualification for county electors in counties is the same as for burgesses in boroughs (*e*). When a municipal borough which is not a county borough forms part of a county, it is usually an electoral division, and the burgesses are the county electors (*f*). The councillors are elected for a term of three years ; and then retire together, and their places are filled by a new election (*g*). The chairman is elected by the council ; and the aldermen, half of whom retire every three years, are elected by the councillors, in the same way as aldermen of boroughs are elected under the Municipal Corporations Act, 1882 (*h*).

The qualification for councillors and aldermen is nearly the same as for borough councillors, but somewhat wider, as clerks in holy orders and ministers of religion are not disqualified ; and peers owning property in the county, and persons registered as parliamentary voters in respect of the ownership of property in the county, are qualified, though they may not have the burgess qualification (*i*). Women may be elected if they have the necessary qualification (*k*).

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|---|--|
| ( <i>a</i> ) Act of 1888, s. 79.              | ( <i>g</i> ) Local Government Act, 1888, s. 2.       |
| ( <i>b</i> ) <i>Ibid.</i> s. 2.               | ( <i>h</i> ) <i>Ibid.</i> s. 75.                     |
| ( <i>c</i> ) <i>Ibid.</i> s. 83.              | ( <i>i</i> ) <i>Ibid.</i> s. 2.                      |
| ( <i>d</i> ) <i>Ibid.</i> s. 75.              | ( <i>k</i> ) Qualification of Women Act, 1907, s. 1. |
| ( <i>e</i> ) <i>Ibid.</i> s. 2.               |  |
| ( <i>f</i> ) County Electors Act, 1888, s. 7. |  |

*Powers of a County Council.*—As a county council is a purely statutory creation, its powers are limited to those conferred upon it by statute (*a*). It has the same power to make by-laws within the county as the council of a borough has within the borough; but the by-laws of a county council are not operative in any borough (*b*). It has power to oppose and promote Bills in parliament (*c*). It has succeeded to all the property and also to all the liabilities of the old county authorities; and has acquired full powers of management of, and also full power (with the sanction of the Local Government Board) to alienate, the county property (*d*).

The business of every county council includes (among other less important matters) the making, assessing, and levying of county and police rates; the borrowing of money and the passing of the accounts of the county treasurer (*e*); the control, under the Board of Education (*f*), of elementary and higher education under the Education Act of 1902 (*g*); the provision, enlargement, maintenance, management, and visitation of pauper lunatic asylums, and of reformatory and industrial schools; the payment of compensation (payable formerly by the hundred or by the inhabitants of a county), under the Riot (Damages) Act, 1886; the registration of the rules of scientific societies; the registration of charitable gifts, the certifying of places of religious worship, and the confirming of the rules of loan societies; the maintenance of the assize courts, police-stations, and county buildings generally; the maintenance of county bridges and main roads, and bridges carrying such roads (*h*); the enforcement of the Diseases of Animals Acts, and of the Acts

(*a*) *A.-G. v. L. C. C.* [1901] 1 Ch. 781; [1902] A. C. 165.

(*b*) Act of 1888, s. 16.

(*c*) *Ibid.* s. 15; and County Councils (Bills in Parliament) Act, 1903 (3 Edw. 7, c. 9).

(*d*) *Ibid.* s. 64.

(*e*) Act of 1888, s. 3.

(*f*) See, in cases of default, Local Authorities Default (Education) Act, 1904 (4 Edw. 7, c. 18).

(*g*) See *post*, pp. 55–64.

(*h*) Act of 1888, ss. 3–11. See *post*, p. 39, as to urban authorities retaining this duty.

relating to destructive insects, and to the protection of fish and of wild birds, and to the prevention of river pollution; the supervision of weights and measures, and of gas-meters; the appointment and payment of medical officers (*a*), and of public inspectors and analysts, and the like, and of the county treasurer and county surveyor, and of the coroner for the county or any district of a county (*b*); and the licensing of houses or places for the public performance of stage plays (*c*).

*Police.*—The county police are under the control of the county council and quarter sessions jointly; and for this purpose there is appointed a ‘standing joint committee,’ consisting of justices appointed by quarter sessions, and of members of the county council appointed by that council (*d*). The expenditure required for the purposes of the standing joint committee is provided for by the county council out of the county fund (*e*).

By various Acts of Parliament passed after the Local Government Act, 1888, county councils have had divers other powers conferred on them. Among them are powers to make agreements with adjoining counties and other highway authorities as to the construction, maintenance, alteration, or improvement of highways and bridges, and the approaches thereto (*f*); to contribute to the expenses of inquiries before the Charity Commissioners touching any charity appropriated for the benefit of their counties (*g*); to acquire land for the provision of small holdings for persons who desire to buy or lease and

(*a*) Act of 1888, s. 17.

(*b*) *Ibid.* s. 5.

(*c*) *Ibid.* s. 7; the Theatres Act, 1843 (6 & 7 Vict. c. 68). The County Councils of London and Middlesex have transferred to them also certain powers in respect of the licensing of places for music and dancing, and of places for horse racing. (See s. 3 (*v*) of the Act of 1888 and

the Music and Dancing Licenses (Middlesex) Act, 1894, and the Racecourses Licensing Act, 1879.

(*d*) Act of 1888, ss. 9, 30.

(*e*) *Ibid.* s. 30.

(*f*) Highways and Bridges Act, 1891 (54 & 55 Vict. c. 63).

(*g*) Charity Inquiries (Expenses) Act, 1892.

will themselves cultivate them (a); to lend money to tenants who desire to purchase their holdings from their landlords (b); and to provide allotments when the district or parish councils, on whom the duty primarily falls, make default in doing so (c). Their powers with regard to highways and the assertion of public rights in connection therewith, and their powers with respect to parish councils, will be explained later (d).

*Finance.*—The principal sources of revenue of the county council are the county and police rates which are made assessed and levied by the county council (e). All moneys received by the county council from these and other sources are carried to the county fund; and all payments for county purposes are made in the first instance out of the county fund, through the county treasurer (f).

Every county council must appoint a finance committee for regulating and controlling the finances of the county; and a resolution of the council, on the recommendation of such committee, is necessary to any order of the council for payment of any sum out of the county fund (g).

The county council may (with the sanction of the Local Government Board) borrow money on the security of the county revenues (h), up to the limit of one-tenth of the rateable value of the rateable property within the county; but not beyond that limit, except under the authority of a Provisional Order of the Local Government Board, confirmed by Act of Parliament. Such loans may be contracted for any purpose for which quarter sessions were authorised to borrow, for the discharge of old loans, and for any permanent work which the council is authorised to do (i). The council may raise such moneys

(a) Small Holdings and Allotments Act, 1908, ss. 1—18.

(b) *Ibid.* s. 79.

(c) *Ibid.* s. 24.

(d) See *post*, pp. 47, 50, 92–93.

(e) Act of 1888, s. 13.

(f) *Ibid.* s. 68.

(g) *Ibid.* s. 80.

(h) *Ibid.* s. 69.

(i) *Ibid.*

either as one loan or as several loans, and either by stock issued under the Act, or by debentures or annuity certificates under the Local Loans Act, 1875, or (in special cases) by mortgage (*a*). And generally, county stock may be created and issued, transferred, dealt with, and redeemed, as provided by the regulations made for that purpose by the Local Government Board (*b*).

*Local Taxation Account.*—It was formerly the practice to supplement the county fund by grants from the Exchequer. In lieu of such grants, county councils are now empowered to levy within their counties the duties on certain 'local taxation licenses,' viz. licenses to deal in game, and for dogs, killing game, guns, carriages (including motor cars), armorial bearings, and male servants (*c*). Through the Exchequer they receive also the proceeds of the duties collected in the county by the Inland Revenue Commissioners on certain other 'local taxation licenses,' including licenses for the sale of wines, spirits, beer, ale, and tobacco (*d*). These sums are received by the county council in lieu of the grants previously made to it from the Exchequer, and, when received, are carried to a separate account, called the Exchequer Contribution Account of the council (*e*). County councils also receive from the Exchequer a certain part of the probate duties collected each year within the county (*f*), or the equivalent amount of the estate duty (*g*); this also being a tax assigned in lieu of the grants previously made in aid of local taxation. And, to compensate them for loss by reason of the Agricultural Rates Act, 1896, which exempts agricultural land from half the county and other rates, they receive a further sum out of the proceeds of the estate duty (*h*). The county council, under the

(*a*) Act of 1888, s. 69.

by the Finance Act, 1907, s. 17.

(*b*) *Ibid.* s. 70.

(*f*) Act of 1888, ss. 21, 22, 24.

(*c*) *Ibid.* s. 30.

(*g*) Finance Act, 1894, s. 19.

(*d*) Finance Act, 1908, s. 6;  
Finance Act, 1910, ss. 86, 88;  
Revenue Act, 1911, s. 18.

(*h*) Agricultural Rates Act,  
1896, s. 2 (2); Finance Act, 1907,  
s. 17.

(*e*) Act of 1888, as amended

Education Act, 1902, as local education authority, also administers the education grants in aid.

*The County in relation to Boroughs other than County Boroughs.*—Where a borough is a quarter sessions borough, and has a population of 10,000 and upwards, according to the census of 1881, but is not made a county borough by the Local Government Act, it falls within the administrative county in which it is situate; but the powers, duties, and liabilities of the council of the borough under the Municipal Corporations Act, 1882, remain with the council of the borough, and do not pass to the county council (a). Nevertheless, the parishes within such borough are made liable to contribute, as a general rule, to the costs of all general county purposes; but with certain exemptions (b). The county council succeeds to the powers, duties, and liabilities of an administrative character which were, previously to 1888, vested in the court of quarter sessions of justices of any borough which is not made a county borough (c). Where a borough has a population of less than 10,000, certain of the functions of the council of the borough are transferred to the county council. But the borough in all cases remains the urban sanitary district, and the borough council the urban sanitary authority (d).

*The County in relation to County Boroughs.*—A county borough is an administrative county, and is not included in the area of the administrative county in which it is locally situate. It has not, however, a county council; but the council of the borough has most of the powers of a county council, in addition to those which it has as the council of a municipal borough. As the council of an administrative county, it is entitled, in the same way as a county council, to collect and receive its share of the local taxation licenses and of the probate or estate

(a) Act of 1888, s. 35.

(b) *Ibid.*

(c) *Ibid.* ss. 36, 39.

(d) *Ibid.* ss. 35, 38; Public Health Act, 1875, s. 6.



duties ; and the council of the county borough makes the like payments thereout as are made by the county council (*a*). The bridges within the borough repairable by the county, and the main roads within the borough, are repairable by the county borough ; and the council of the county borough may appoint the coroner, where the district of the county coroner is wholly situate within the county borough (*b*). The internal constitution, however, of a county borough and its council is unaffected by the Act of 1888 ; and the constitution of a county borough remains governed by the Municipal Corporations Act of 1882 (*c*).

### C. URBAN AND RURAL DISTRICT COUNCILS.

When speaking of municipal corporations, we pointed out that many of the powers which the council of a borough exercises, it enjoys as urban sanitary authority for the borough. In those parts of a county which are not included in a borough, however, there exist other sanitary authorities known as 'urban district councils' or 'rural district councils' ; and the county is divided into urban and rural sanitary districts, each subject to its own council for certain purposes. The principal business of these councils is to carry out the provisions of the law relating to public health (*d*) ; and they are (subject to certain distinctions between urban and rural councils (*e*), and subject to the powers of the county council with regard to main roads) the highway authorities within their districts. There are important differences between the powers of urban and rural councils, due principally to the substantial differences that exist in the requirements of an urban and a rural area.

(*a*) Act of 1888, ss. 32-34.

(*b*) Act of 1888, s. 34.

(*c*) *Ibid*.

(*d*) See *post*, ch. vi.

(*e*) Public Health Act, 1875, s. 144 ; Local Government Act, 1888, s. 25. And see *post*, ch. v. (pp. 89-92).

*Constitution of District Councils.*—In both urban and rural districts, the council is elected by all the parochial electors in the district (a). The parochial electors are ‘the persons registered in such portion either of the local government register of electors or of the parliamentary register of electors as relates to the parish’ (b). As women may be on the local government register (*i.e.* the register of persons entitled to vote for county councillors), they may, if they are on that register, vote for district councillors. The persons qualified to be elected as district councillors are the parochial electors of parishes within the district, and persons who, during the whole of the twelve months preceding the election, have resided in the district. Women, whether married or single, are eligible if *prima facie* qualified (c). Persons who have the necessary qualification are disqualified if they are infants or aliens, or if they hold any paid office under the council, or are concerned in any bargain or contract with the council. Bankruptcy or a sentence of imprisonment with hard labour on conviction of any crime disqualifies for five years (d). District councillors are elected for a term of three years, one-third retiring annually; unless the council desires that all should retire simultaneously, and the county council makes an order to that effect. The chairman is appointed for one year by the council; and need not be a member of the council (e). Unless a woman, or personally disqualified by any Act, he is an *ex-officio*

(a) Local Government Act, 1894, ss. 20, 24, 23, 75 (2).

(b) *Ibid.* s. 2. The local government register is the register of persons entitled to vote at County Council elections (*ante*, p. 35). Many persons are qualified to be on both the local government and the parliamentary register (*e.g.* men occupiers). But some are entitled to be on the parliamentary and not

the local government register (*e.g.* lodgers and non-occupying freeholders) and others on the local government register and not the parliamentary register (*e.g.* women occupiers). But if they are on either register they are parochial electors.

(c) *Ibid.* s. 23.

(d) *Ibid.* s. 46.

(e) *Ibid.* s. 59.

justice of the peace for the county during his term of office (a). A district council is a body corporate, with a common seal and power to hold lands for its proper purposes without license in mortmain (b); but the inhabitants are not incorporated.

*Powers of District Councils.*—The powers of district councils as highway and sanitary authorities are dealt with in their proper places (c). It is convenient here to notice certain additional functions conferred on them by the Local Government Act of 1894. By that Act (d), every district council, besides being charged with the duty of protecting all public rights of way, and preventing unlawful encroachments on road-side wastes, is empowered to aid any persons in maintaining any rights of common in its district. Urban district councils are also empowered to provide allotments for persons belonging to the labouring population, and to take land for that purpose (e).

The Local Government Board may confer on the council of any borough, or of any other urban district, the right of appointment of, or the powers of, the overseers of the poor (f). It was not necessary to make such provision in rural districts; inasmuch as in such districts the power of appointing overseers is vested in the parish council (g), whereas in urban districts, there being no parish councils (in default of an Order of the Local Government Board), the appointment remains in the vestry and the justices as before (h). It should also be noticed, that those who are elected as rural councillors serve also as representatives for the parish or area that elects them; as guardians of the poor on the board of guardians (i);

(a) Local Government Act, 1894, s. 22.      (f) Act of 1894, s. 33.

(b) Public Health Act, 1875, s. 7; Local Government Act, 1894, s. 24.      (g) *Ibid.* s. 5.

(c) See *post*, chs. v. and vi.

(d) S. 26.

(e) Small Holdings and Allot-

(h) Poor Relief Act, 1601, s. 1; Poor Law Amendment Act, 1866, s. 11; *R. v. Lancashire JJ.* (1860) 29 L. J. M. C. 244.

(i) Act of 1894, s. 24.

with the result that, in purely rural unions, the members of the board of guardians and of the rural district council are identical, although the two bodies are quite distinct. In urban parishes, guardians and district councillors have to be separately elected.

*The Expenses of District Councils.*—The principal financial resource of an *urban* sanitary authority is the general district rate; which it has power to levy by its own officials, to an unlimited amount. This rate is levied on the occupiers of all kinds of property assessable to any rate for the relief of the poor, and is assessable on the full net annual value of such property ascertained by the valuation list; but the owners of tithes, and occupiers of land used as arable, meadow, or pasture land, or as woodland, orchards, market gardens or nursery grounds, allotments, canals, railways, and some other property of a kind not specially benefited by the purposes for which the district rate is levied, are assessed at one-fourth only of their net annual value (*a*). Where the sanitary authority is the council of a borough, its sanitary and highway expenses are charged on the district fund created by this district rate; and this fund and rate are and must be kept distinct from the borough fund and rate mentioned above (*b*).

The expenses of a *rural* council may be either general or special. In the term 'general expenses' are included the expenses of the establishment and officers of the rural authority, disinfecting expenses, highway expenses (*c*), and other expenditure (*d*) by which the whole district is likely to benefit. These expenses are payable out of a common fund raised out of the poor rate of the parishes

(*a*) Public Health Act, 1875, s. 211, as extended by the Public Health (Rating of Orchards) Act, 1890, and the Allotments Rating Exemption Act, 1891; Agricultural Rates Act, 1906, s. 1.

(*b*) See *ante*, p. 26; Public

Health Act, 1875, ss. 207-228; *Leith Corporation v. Leith Harbour* [1899] A. C. 508.

(*c*) Local Government Act, 1894, s. 29.

(*d*) Public Health Act, 1875, s. 229.

in the district according to their rateable value. Special expenses are charged separately on the particular part of the district for which they have been incurred. The provision of a water supply or a sewerage scheme or working-class dwellings for any particular part of, or 'contributory place' in, a rural district, are special expenses, and charged separately to such 'contributory place' accordingly. Special expenses are levied by the overseers as a separate rate, in the same manner as if it were a poor rate (*a*); except that, as in the case of the district rate in an urban district, owners of tithes and occupiers of arable and pasture land, and the other properties above enumerated, are assessed at one-fourth only of their rateable value (*b*).

The distinction between the *powers* of urban and rural councils respectively will appear in the chapters on highways and sanitation. But it may here be noticed, that the Local Government Board may confer upon any rural council urban powers in respect of the whole or any part of its district (*c*); similarly, the Local Government Board may confer on the council of any borough or any urban district the powers of a parish council. Wide powers are given to the county council, subject to the Local Government Board, to alter the area of any district, to divide it, or to convert an urban into a rural district, and *vice versa* (*d*).

#### D. PARISH COUNCILS AND PARISH MEETINGS.

In rural districts, a further unit of local government has been created by the Local Government Act, 1894 (*e*).

(*a*) If the amount required is less than £10, or so small that a rate of less than one penny in the pound will produce it, no separate rate is levied; and the amount is paid out of the poor rate.

(*b*) Public Health Act, 1875.

of Orchards) Act, 1890, s. 1; Allotments Rating Exemption Act, 1891, s. 1; Agricultural Rates Act, 1896, s. 1.

(*c*) Public Health Act, 1875, s. 276.

(*d*) Act of 1888, s. 57; Act of 1894, s. 35.

Before the passing of that Act, the parish was only to a very limited extent a unit of local government. Some powers were vested in the inhabitants of the parish in vestry assembled; and others in the overseers, or churchwardens and overseers. But the functions of the vestry and churchwardens were partly those relating to the affairs of the church; and the overseers were primarily authorities for administering the poor law.

The general scheme of the Act of 1894 is to separate the civil affairs of the parish from those of the church. The vestry and the churchwardens are retained; but their duties are now confined to affairs of the church and ecclesiastical charities; and their civil functions have been transferred to parish meetings or parish councils. These provisions of the Act only apply to rural parishes, *i.e.* those which are contained in rural districts. Urban districts, as we have seen, have their urban district councils or borough councils. Rural districts have their rural district councils; and all parishes in these districts have also parish meetings, and (in some cases) parish councils, to deal with those matters of parochial government which are of a civil nature, and are outside the powers of the rural district council (*a*). The Act makes provision for parishes situate partly in urban and partly in rural districts, by dividing them for civil purposes, and making the rural parts into separate rural parishes; leaving the urban parts under the urban council (*b*). Thus, a rural parish is one which lies wholly within a rural district.

In every rural parish there is now a *parish meeting*, which is an assembly of all the 'parochial electors' of the parish, *i.e.* all men who are registered as parliamentary voters, and all men and women registered as county electors in the parish (*c*). The parish meeting assembles

(*a*) 56 & 57 Vict. c. 73, ss. 1, 2, 6, 19.

(*b*) *Ibid.* s. 1 (3).

(*c*) *Ibid.* ss. 2, 44. As to these, see *ante*, pp. 35 and 42.

at least once a year in every parish, and may meet oftener (*a*). In parishes where there is a parish council, the councillors are elected by the parish meeting; in parishes where there is no parish council, the parish meeting is itself the administrative body for the parish (*b*).

*Parish Councils.*—Every rural parish which, according to the census of 1891, had a population of 300 or more, has a parish council; and the county council may, and in some cases must, establish parish councils in smaller parishes, if demanded by the parish meeting (*c*). When there is a parish council, it is the principal administrative body for parochial affairs; and the chief functions of the parish meeting are those of electing the parish council, and giving its consent to the exercise by the parish council of certain powers.

The parish council consists of from five to fifteen members, who must be either parochial electors or persons (male or female) resident in or within three miles of the parish (*d*). The disqualifications for office are the same as those for the office of district councillor (*e*). The councillors are elected once in three years (*f*). They are nominated, and may be elected, at the annual assembly of the parish meeting; but any five parochial electors may demand a poll. If a poll is demanded, the election takes place subsequently by ballot papers (*g*).

The parish council is a body corporate, with perpetual succession and power to hold lands for the purposes of its powers without license in mortmain (*h*).

*Parish Meeting.*—In those parishes which have not a council, the parish meeting exercises many of the powers which in a parish having a council are vested in the council. In those parishes, the chairman of the parish meeting and the overseers of the parish are incorporated,

(*a*) Act of 1894, ss. 2, 44.

(*b*) *Ibid.* s. 3.

(*c*) *Ibid.* s. 1.

(*d*) *Ibid.* ss. 3, 43.

(*e*) *Ibid.* s. 46.

(*f*) Parish Councillors (Tenure of Office) Act, 1899 (62 & 63 Vict. c. 10).

(*g*) Act of 1894, s. 48.

(*h*) *Ibid.* s. 3 (9).

and have perpetual succession, with power to hold land for the purposes of the parish without license in mortmain (a). The parish meeting must assemble not less than twice a year; and all the parochial electors of the parish are entitled to attend and vote. Questions are decided by show of hands, unless a poll is demanded; in which event the vote is taken by ballot (b).

*Powers of Parish Council.*—Among the more important of the powers of a parish council are those of managing parish property. It may acquire land and provide buildings for public offices, hire or buy land for allotments for the labouring classes, acquire land for a recreation ground, make by-laws for recreation grounds and village greens under its control, acquire rights of way, and maintain and keep in repair public footpaths. It has the custody of the public books and papers of the parish; except those relating to the church and ecclesiastical charities. It has also power to elect trustees and beneficiaries of non-ecclesiastical charities, in cases where the vestry formerly had that power. And it may supply a fire engine and fire escape and a parish chest (c).

The parish council has also conferred upon it the power to appoint the overseers of the parish, and may appoint an assistant overseer (d). Its powers with regard to sanitary matters are very limited. It may utilize a natural water-supply, and may cleanse or cover up ponds, ditches, etc., which are prejudicial to health. It may make representations to the district council with regard to certain matters requiring the attention of that council, and may complain to the county council if the district council makes default in carrying out its powers in the parish. The district council may delegate some of its powers to the parish council (e).

The parish council is also the mouthpiece of the parish

(a) Act of 1894, s. 19.

Allotments Act, 1908, s. 23.

(b) *Ibid.* s. 2.

(d) Act of 1894, s. 5.

(c) *Ibid.* ss. 6, 8; and (as to allotments) Small Holdings and

(e) *Ibid.* ss. 6, 8, 15.



to consent to an order for stopping up or diverting a highway, and to the construction of tramways in the parish (a).

Many of these powers are exercisable by the parish meeting of a parish which has no parish council (b).

More extensive powers may be acquired by a parish council by the adoption of certain Acts known as the 'adoptive Acts.' These Acts can only be adopted by the parish meeting; and when any one of them is so adopted, the powers contained in it are conferred on the parish council. These Acts are (i) the Public Libraries Act, 1892–1901, which enables the parish council to supply a public library, (ii) the Baths and Washhouses Acts, 1846 to 1899, giving power to supply public baths and washhouses, (iii) the Lighting and Watching Act, 1833, giving power to provide street lamps, (iv) the Public Improvements Act, 1860, under which a public recreation ground can be acquired, (v) the Burial Acts, 1852 to 1906, under which a burial ground can be provided (c).

The amount which a parish council or parish meeting may spend is limited. What money it requires, within the limits of its authorised expenditure, it obtains from the overseers, who raise the amount out of the poor rate (d). Thus a parish council may not, without the consent of a parish meeting, incur expenses or liabilities which will involve a rate exceeding threepence in the pound for any financial year, or which will involve a loan; and, even with the consent of the parish meeting, a parish council's expenses (other than under the adoptive Acts) must not exceed a sum equal to a rate of sixpence in the pound for any year (e). The expenses of a parish meeting, where there is no parish council, must not, all together, exceed a sum equal to a rate of sixpence in the pound (f). The

(a) Act of 1894, ss. 13 (1), 6,  
19; 33 & 34 Vict. c. 78, ss. 4, 46.

(b) Act of 1894, s. 19.

(c) *Ibid.* s. 7.

(d) *Ibid.* s. 11.

(e) *Ibid.*

(f) *Ibid.* s. 19 (9).

accounts of a parish meeting and those of a parish council are audited every year by a district auditor appointed by the Local Government Board (*a*).

For any of the following purposes, viz. (1) for the purchase of any land, or for the building of any buildings, which the parish council may lawfully purchase or build ; (2) for any purpose authorised by such of the ' adoptive Acts ' above referred to as the parish meeting may have adopted ; and (3) for any permanent work or other thing which the parish council may lawfully execute or do—the parish council may, with the consent of the county council and of the Local Government Board, borrow money, in like manner, and subject to the like conditions, as a local authority may borrow under the provisions of the Public Health Act, 1875. The loan is secured on the poor rate and the other revenues of the parish council ; and the amount which may be borrowed is limited to one-half of the assessable value of the premises assessable within the parish (*b*).

### E. LONDON.

The local government of London requires separate notice. The Municipal Corporations Acts do not, with the exception of a few sections (*c*) apply to London ; neither does the Public Health Act of 1875. In nearly every department of local government, London is governed by statutes applicable to the Metropolis only.

By the Local Government Act, 1888 (*d*), the metropolis is constituted an administrative county, by the name of the (administrative) ' County of London ' ; the council of which is now known as the London County Council (*e*).

(*a*) Act of 1894, s. 58.

Government Act, 1899, s. 16.

(*b*) *Ibid.* s. 12.

(*d*) S. 40.

(*c*) *E.g.* certain sections are incorporated by the London

(*e*) It is important to remember that the London County

The area which forms this administrative county is also a separate county for non-administrative purposes. Inside the county lies, of course, the City of London; but the City of London, for all non-administrative purposes, continues a separate county. As the Municipal Corporations Acts, 1835 and 1882, do not apply to the City of London, its constitution is still largely governed by its ancient charters; and it is sometimes spoken of as an 'unreformed corporation.'

In addition to the City, which is governed by the Court of Common Council, there exist inside the administrative county of London twenty-nine metropolitan boroughs. The councils of these metropolitan boroughs exercise the sanitary powers of the old 'select vestries' and district boards under the Metropolis Management Acts, the Public Health (London) Acts, and other local Acts (a). Several of the powers of the London County Council were, by the London Government Act, 1899, transferred to the new metropolitan boroughs (b); in particular there are now no main roads in the county, but all roads are vested in and transferred to the borough councils (c).

The county councillors for the administrative county of London are double the number of members of parliament returned for the metropolis, each borough (or division of a borough) being made an electoral division of the administrative county; and the number of county aldermen is not to exceed one-sixth of the whole number of county councillors (d).

Before 1888, the central administrative body for the metropolis was the Metropolitan Board of Works, constituted by the Metropolis Management Act, 1855; and for the several parishes or groups of parishes (outside

Council is not a municipal corporation, and has none of the common law powers of such a corporation; being limited to the powers conferred on it by statute (*A.-G. v. London County*

*Council* [1902] A. C. 165).

(a) London Government Act, 1899, s. 4.

(b) *Ibid.* s. 5.

(c) *Ibid.* s. 6.

(d) Act of 1888, s. 40 (5).

the city) there were 'select' or elective vestries, or district boards of works, constituted under the same Act. All the powers of the Metropolitan Board of Works have now been transferred to the London County Council (*a*); and, by the London Government Act (*b*), 1899, the functions of the vestries and district boards have been transferred to the councils of the metropolitan boroughs constituted by that Act. The powers formerly exercised by these bodies have been largely increased from time to time by subsequent Acts (*c*).

(*a*) Act of 1888, s. 40 (8) (9).

(*b*) Ss. 4, 31, 34.

(*c*) *E.g.* London Council  
(Money) Act, 1889 (52 & 53 Vict.

c. 61); London County Council  
(Money) Act, 1890 (53 & 54 Vict.

c. 41); 1891 (54 & 55 Vict.

c. 62); Shops Act, 1912, etc.

## CHAPTER III.

## OF THE LAWS RELATING TO EDUCATION.

THE duty of the State to educate its citizens has been but slowly recognised by Parliament (*a*). At the beginning of the nineteenth century, neither local nor central bodies had been established in England and Wales to carry out the work of elementary education. Between 1806 and 1833, many fruitless efforts were made to set up some form of public instruction. In 1833, the House of Commons voted the first grant (20,000*l.*) in aid of education. This grant was administered by the Treasury, which practically depended for its distribution upon the advice of the Anglican "National Society" and the undenominational "Society for Promoting Christian Knowledge"; there being few schools available for public elementary education except those established by the clergy of the Church of England and the other religious societies. The schools of these societies were the forerunners of the modern voluntary schools; which still retain elements of a private character under the Education Act of 1902. In 1839, a special committee of the Privy Council was appointed to administer the annual grant. In 1856, by an Order in

(*a*) The principal Acts of Parliament dealing with elementary and higher education are—

1. The Education Acts, 1870 to 1911, with which should be included the unrepealed sections of the Voluntary Schools Act, 1897.

2. The Children Act, 1908 (repealing but substantially re-

enacting the Industrial and Reformatory Schools Acts, 1866–1899; and the Youthful Offenders Act, 1901).

3. The Welsh Intermediate Education Act, 1889.

4. The Education Act, 1902, which repeals some of the above Acts in part (see Fourth Schedule to the Act).

Council, an Education Department was founded ; and in the same year the first Elementary Education Act was passed (19 & 20 Vict. c. 116) which created the new office of Vice-President of the Committee of the Privy Council, a Ministerial office capable of being held by a member of the House of Commons. The grant grew steadily, until in 1861 it reached 842,806*l.* In that year, a system of payment by results (*i.e.*, by examinations under inspectors appointed by the committee) was instituted. Moreover, the minutes and regulations of the department were amended and consolidated ; and a revised code was issued, in which the object of government grants in aid of education was declared to be “ to promote the education “ of children belonging to the classes who support them- “ selves by manual labour.” The voluntary system remained, with slight alterations by Acts of Parliament and departmental Orders, until 1870 ; when Parliament passed the Elementary Education Act, 1870 (*a*), which still—except as regards the organisation and constitution of local authorities—remains the basis of elementary education in England and Wales. By that Act, as will be seen, school boards and board schools were established. School boards were local authorities for purposes of elementary education ; and although, by the Education Act, 1902, school boards are abolished and their place taken by county, borough, and district councils, nevertheless education is so important and peculiar a branch of local government, that it seems most convenient to continue to treat it, like the law of public health, in a separate chapter, in spite of the fact that these two subjects are not any longer dealt with by what are called *ad hoc* bodies.

By the Board of Education Act, 1899 (*b*), there was constituted the Board of Education, consisting of a President, of the Lord President of the Council (unless he is appointed President of the Board), His Majesty's

(*a*) 33 & 34 Vict. c. 75.

(*b*) 62 & 63 Vict. c. 33, s. 1.

Principal Secretaries of State, the First Commissioner of His Majesty's Treasury, and the Chancellor of the Exchequer; and this Board now takes the place of the Education Department, though, in fact, its whole business is conducted by the President and officials (parliamentary and permanent) (a). As, however, elementary instruction is not the only aspect of education which has a public character, this chapter will be devoted to the discussion—  
I. Of Public Elementary Education; II. Of Higher Education and Technical Instruction; III. Of Public and of Endowed Grammar Schools; IV. Of Sites for Poor Schools, and for Literary and Scientific Institutions; V. Of Pauper Schools; VI. Of Reformatory Schools; and VII. Of Industrial Schools.

I. *Public Elementary Education*.—The chief provisions on this subject will, as we have said, still be found in the Elementary Education Act, 1870; the general scheme of which remained unaltered until the passing of the Education Bill brought before Parliament in 1902, although in certain points of detail alterations had been effected (b). Under the scheme of the Act of 1870, the whole of England was portioned out into *school districts*; and, for each district, it was enacted that there should be provided a sufficient amount of accommodation in public elementary schools, available for all the children resident in such district, for whose elementary education efficient and suitable provision was not otherwise made (c).

The areas constituted school districts by the Act of 1870 were, the metropolis, and, outside the metropolis,

(a) Board of Education Act, 1899, s. 2.

(b) Elementary Education Acts, 1873 (36 & 37 Vict. c. 86); 1876 (39 & 40 Vict. c. 79); 1880 (43 & 44 Vict. c. 23); 1890 (53 & 54 Vict. c. 22); 1891 (54 & 55 Vict. c. 56); and 1897 (60 & 61 Vict. c. 16). As to

*voluntary* schools, see the Voluntary Schools Act, 1897 (60 & 61 Vict. c. 5), and (as to blind and deaf children) the Elementary Education (Blind and Deaf Children) Act, 1893 (56 & 57 Vict. c. 42).

(c) 33 & 34 Vict. c. 75, s. 5.

every borough and, speaking generally, every parish not included in a borough. But, by the Education Act, 1902, the council of every county and county borough, and also of every non-county borough with a population of over 10,000, and of every urban district with a population of over 20,000, is constituted the local education authority for purposes of elementary education (a).

The object of the Act of 1870 was to provide schools at the public expense in districts where the accommodation provided by the existing voluntary schools was insufficient. The general execution of the scheme of the Act of 1870 was entrusted to the Education Department, which might order a new body to be elected for that purpose in each school district. These bodies were called 'school boards.' Their powers and duties, as well as those of school attendance committees (b), have now, by the Act of 1902, been transferred to the local education authority (c). The local education authority in general must appoint, and refer educational matters to, an education committee. This education committee must consist partly of women; and the members thereof need not all be the members of the council appointing it (d). The Act of 1902 was, in 1903, applied, with certain modifications, to London (e); and the London County Council is there the local education authority. School boards and school attendance committees being abolished, the new local education authority is made responsible for, and has the control of, all secular instruction in all public elementary schools; and is required to maintain and keep efficient all public elementary schools within its area which are necessary (f), and to provide a sufficient

(a) Education Act, 1902, s. 1.

(b) Created by the Elementary Education Act, 1876 (39 & 40 Vict. c. 79), to enforce compulsory attendance of children in districts where no school boards existed.

(c) Act of 1902, s. 5.

(d) *Ibid.* s. 17.

(e) Education (London) Act, 1903 (3 Edw. 7, c. 24).

(f) *A.-G. v. West Riding of Yorkshire* [1907] A. C. 29.



amount of school accommodation without payment of fees (a). Public elementary schools are thus no longer divided into 'board schools' and 'voluntary schools.' The old board schools and schools provided since 1902 by the local education authority are now known as 'provided schools;' and those which were formerly called voluntary are now known as 'non-provided' schools.

The control of the expenditure necessary for the above purposes is in the local education authority; but there is included in its duty of maintaining the non-provided schools, the obligation of providing for the reasonable expenses of the religious instruction lawfully given in them (b), over which instruction the local education authority has no control.

Every public elementary school has also a body of *managers*. In the case of schools provided by the local authority, these managers are appointed by the local authority (c); and deal with such matters of management as the local authority may determine (d). In the case of 'non-provided' schools, the body of managers consists of a number of 'foundation managers,' not exceeding four, appointed under the provisions of the school trust deed, and of a number of managers, not exceeding two, appointed by the local authority (e).

The new principle introduced by the Act of 1902 was to entitle non-provided schools to rate aid from the local education authority. Under the Act of 1870, the voluntary schools had no aid from the rates. Now that they have such aid, it is necessary that their expenditure should in some way be controlled by the local authority; and so the Act of 1902 created, in the case of these schools, two co-ordinate authorities, the local education authority, and the managers, between which the powers of management are divided. The managers of a 'non-provided'

(a) Act of 1902, ss. 5, 7, 16.

(b) *A.-G. v. West Riding of Yorkshire* [1907] A. C. 29.

(c) Act of 1902, s. 6 (1).

(d) *Ibid.* Sched. I., B. (4).

(e) *Ibid.* s. 6 (2).

school have to provide the school house, and keep it in good repair, and make such alterations and improvements in it as are necessary, at their own expense. But the local education authority has to maintain the school, and keep it efficient; and, out of the rates, it provides the money for so doing. Accordingly, the local education authority pays the teachers, and (when required) a cleaner and caretaker (*a*), and must supply desks and school furniture (*b*). Moreover, it must maintain the school in its entirety, and cannot reduce a school carried on as one for both sexes and of all standards to the status of an infants' school, or a school for one sex only (*c*). On the other hand, the teachers, though paid by the education authority, are appointed and dismissed by the managers (*d*) subject to the consent of the local authority, so far as the grounds of such employment or dismissal concern the fitness of the teachers to give secular instruction (*e*). The local education authority is responsible for the secular education; and, as regards that, the managers have to comply with the directions of the local education authority, which has power to inspect the schools. But the religious instruction (to be given in accordance with the trust deed) is under the control of the managers. If the managers fail in their duty as regards the school house, the local education authority is no longer bound to maintain the school, and keep it efficient (*f*).

In the case of 'provided schools,' the whole expense and management fall to the local education authority, which is responsible for the maintenance of the school house as well as for the efficiency of the education. The

(*a*) *Gillow v. Durham County Council* [1913] A. C. 54.

(*b*) *R. v. Easton* [1912] 2 K. B. 161; [1913] 2 K. B. 60.

(*c*) *Wilford v. West Riding* [1908] 1 K. B. 685.

(*d*) Act of 1902, s. 7; *Crocker v. Plymouth* [1906] 1 K. B. 494.

(*e*) Act of 1902, s. 7; *Jones v. Hughes* [1905] 1 Ch. 180; *Blen-cowe v. Northamptonshire* [1907] 1 Ch. 504; *Smith v. Macnally* [1912] 1 Ch. 816.

(*f*) Act of 1902, s. 7; *Young v. Cuthbert* [1906] 1 Ch. 451.

managers of provided schools are only the agents of the authority for carrying out those duties (a).

Each school (provided or non-provided) must be conducted under regulations provided by the Education Acts ; of which the principal are the following :—(1) that it shall not be required as a condition of any child being admitted to or continuing in a school, that he shall attend (or abstain from attending) any Sunday school or place of public worship, or that he shall attend any religious observance or instruction from which he may be withdrawn by his parents, or attend school on any day exclusively set apart for religious observance by the religious body to which his parent belongs (b) ; (2) that the period during which any religious observance is practised, or instruction in religious subjects given, in the school, shall be at prescribed times either at the beginning or at the end of the school hours ; (3) that the school shall at all times be open to the inspection of His Majesty's inspectors of schools, who shall not, however, in the exercise of their duties, inquire into the instruction given to the scholars in religious subjects (c) ; (4) that, in the case of schools provided by the local education authority, no religious catechism or formulary, which is distinctive of any particular denomination, shall be taught in the school (d). In the case of schools which are not provided by the local education authority (*i.e.*, voluntary schools), the religious instruction given must be in accordance with the provisions (if any) of the trust deed relating thereto, and, as has been said, is under the control of the managers ; unless there is in the trust deed a provision for reference to the bishop or superior ecclesiastical or other denominational authority. In the latter case, so far as such provision gives to the bishop or authority the power of

(a) *Ching v. Surrey County Council* [1910] 1 K. B. 736.

(b) *Marshall and Bell v. Graham* [1907] 2 K. B. 112.

(c) Act of 1870, s. 7.

(d) *Ibid.* s. 14 ; *A.-G. v. English, and National Society v. London School Board* (1874) L. R. 18 Eq. 608.

deciding whether the character of the religious instruction is or is not in accordance with the provisions of the trust deed, the provisions of the deed must be observed (a).

If the local education authority fails to fulfil any of its duties under the Education Acts, 1870 to 1911, or the Education Act, 1902, or fails to provide such additional public school accommodation, within the meaning of the Elementary Education Act, 1870, as is, in the opinion of the Board of Education, necessary in any part of its area, the Board of Education may, after holding a public inquiry, make such order as it thinks necessary or proper for the purpose of compelling the authority to fulfil its duty ; and any such order may be enforced by *mandamus* (b). The Board may, further, without inquiry, if satisfied of default on the part of a local authority, itself perform the duties of the local education authority in the district, and recover from the local authority the cost thereof (c).

Until the year 1870, parents were under no general statutory obligation to cause their children to be educated. But the Elementary Education Act, 1870, enabled school boards to make, with the approval of the Education Department, by-laws for all or any of the following purposes :—(1) requiring the parents of children between the ages of five and fourteen (d) to cause such children (unless there is some reasonable excuse) to attend school ; (2) determining the time during which the children are so to attend school ; and (3) imposing penalties for breach of the by-laws.

The exercise of this power was, it will be seen, optional. By the Elementary Education Act, 1876, however, it was expressly declared to be the duty of the parent of every

(a) Act of 1902, s. 7 (6).

(b) *Ibid.* s. 16.

(c) Education (Local Authority Default) Act, 1904 (4 Edw. 7, c. 18), s. 1.

(d) Originally thirteen years.

Now under the Act of 1900 (63 & 64 Vict. c. 53), s. 6, the age is fourteen years.

child to cause it “to receive efficient elementary instruction in reading, writing, and arithmetic” (a). If this duty in regard to a child above the age of five years is habitually and without ‘reasonable excuse’ neglected, it is the duty of the local education authority, after due warning to the parent, to complain to a court of summary jurisdiction (b); by which an ‘attendance order’ may be made, the non-compliance with which may be visited with a pecuniary penalty. And all persons are prohibited, under a penalty, from taking into their employment (subject to certain exceptions) any child, who is under the age of twelve, or who, being above that age but under the age of fourteen, is not *certificated*, or allowed by statute, or a by-law of the local authority, to be fully or partially so employed (c). In the last resort, the child may be sent to a certified industrial school; to the expenses of which the parent will be liable to contribute (d).

By the Elementary Education Act, 1880, the exercise of the power to make by-laws respecting the attendance of children at school was made compulsory (e); and it therefore is now the *duty* of the local education authority to make such by-laws, if none exist in its district. Reasonable excuses for the non-attendance of a child stated by the Act are:—(1) that it is under efficient instruction in some other manner; (2) that it has been prevented from attending by sickness or other unavoidable cause; (3) that there is no public elementary school open which the child can attend within the distance fixed by the by-laws from the child’s residence, which distance must not exceed three miles by the nearest route (f). But there may, of

(a) Act of 1876, s. 4.

(b) *Ibid.* s. 11.

(c) *Ibid.* ss. 5, 6, 9; Elementary Education (School Attendance) Acts, 1893 and 1899 (56 & 57 Vict. c. 51, s. 1; 62 & 63 Vict. c. 13, s. 1); *Strong v. Treise* [1909] 1 K. B. 613.

(d) Act of 1876, s. 12.

(e) 43 & 44 Vict. c. 23, s. 2.

(f) *Ibid.* ‘The nearest road’ is the expression used in the Act. This has been held to mean the nearest route, whether a highway or not (*Hares v. Curtin* [1913] 2 K. B. 328).

course, be other reasonable excuses ; as, for instance, the desire of a parent to send his child to church on Ascension Day (*a*). And whether or not in any given case the excuse is sufficient, appears to be a question of fact (*b*).

Elementary education is provided free for children in all schools which receive the 'fee grant'; which is a grant, paid out of moneys provided by Parliament, of ten shillings a year "for each child of the number of children, "over three and under fifteen years of age, in average "attendance at any public elementary school in England "or Wales (not being an evening school), the managers of "which are willing to receive the same, and in which the "Board of Education are satisfied that the regulations as "to fees are in accordance with the conditions" in the Elementary Education Act, 1891 (*c*). Under exceptional circumstances, a fee not exceeding sixpence per week per child may be charged to the child's parents (*d*). The ordinary expenses of a council as local education authority are paid, if not otherwise provided for, in the case of a county out of the county fund, and in the case of a borough out of the borough fund or rate, or, if no borough rate is levied, out of a separate rate to be made, assessed, and levied in like manner as a borough rate (*e*) ; and, in the case of an urban district council, out of a fund raised out of the poor rate of the parishes comprised in the district (*f*). But grants made by Parliament under various statutes form a substantial part of the income of a local education authority. In 1906, an Act was passed giving local authorities limited powers to aid in the provision of meals for children in attendance at public elementary schools (*g*).

(*a*) *Marshall v. Graham* [1907] 2 K. B. 112.

(*b*) *Belper v. Bailey* (1882) 9 Q. B. D. 259; *London S. B. v. Duggan* (1884) 13 Q. B. D. 176; *Marshall v. Graham* [1907] 2 K. B., at pp. 123, 128.

(*c*) 54 & 55 Vict. c. 56, s. 1.

(*d*) *Ibid.* s. 4.

(*e*) Act of 1902, s. 18.

(*f*) *Ibid.*; Act of 1876, s. 33.

(*g*) Education (Provision of Meals) Act, 1906 (6 Edw. 7, c. 57).

II. *Higher and Technical Education*.—Although, as has been shown, provision was made by the Elementary Education Act, 1870, for elementary education, except the elementary education of children up to the age of fourteen, was left, until 1889, almost entirely to voluntary effort. The school boards had no authority to provide education, except for children up to the age of fourteen; and then only such education as could be described as ‘elementary.’ An attempt made by the London School Board to give instruction in science and art was held, by the Court of Appeal, to be beyond its statutory powers (a); and the establishment by that Board of schools for the education of pupil teachers was also held to be *ultra vires* (b). But, by the Education Act, 1902, power is given to the local education authority, after consultation with the Board of Education, to supply, or aid the supply of, education other than elementary, and to promote the co-ordination of all forms of education (c).

In Wales, however, a system of ‘intermediate education’ had, before 1902, been established by the Welsh Intermediate Education Act, 1889 (d), which provides for the constitution, in every county of Wales, and in the county of Monmouth, of a joint committee, consisting of three persons nominated by the county council, and two persons, being persons well acquainted with the conditions of Wales and the wants of the people (e), whose duty it is to formulate a scheme for the intermediate and technical education of the inhabitants of the county (f). The expenses of carrying out such a scheme, so far as they exceed the amount yielded by any endowment appropriated for the purpose, and any parliamentary grant, may be defrayed by the county council out of the county fund (g).

In 1864, moreover, a royal charter had been granted,

(a) *R. v. Cockerton* [1901] 1 K. B. 726.

(b) *Dyer v. London School Board* [1902] 2 Ch. 768.

(c) 2 Edw. 7, c. 42, s. 2.

(d) 52 & 53 Vict. c. 40.

(e) *Ibid.* s. 5.

(f) *Ibid.* s. 3.

(g) *Ibid.* ss. 3, 8, 9.

by which the Lord President of the Privy Council for the time being, and the Vice-President of the Committee on Education for the time being, were constituted a body corporate under the name of the Department of Science and Art. This body, which is now merged in the Board of Education (a), receives parliamentary grants, which it devotes to the advancement and encouragement of science and art. By the Technical Instruction Act, 1889 (b), county councils, borough councils, and other (c) urban sanitary authorities (now called urban district councils), were empowered, out of the 'local rate,' to supply, or aid the supply of, technical or manual instruction; and the Education Act, 1902, makes provision for the continuance and development of the schemes started under the earlier Act. Parliament grants to each county, out of the customs and excise duties severally, a sum which the county council must devote to the purpose of technical education (d).

III. *Public and Endowed Grammar Schools*.—In the year 1861, a Royal Commission was issued to inquire into the endowments, and generally into the management, of our public schools; and, in its report, a variety of changes in the government, management, and studies of these schools were recommended for adoption. To carry into effect the principal changes recommended by the Commissioners, the Public Schools Act, 1868, and other Acts were passed (e). By the principal Act it was provided, that the 'governing body' which existed at the date of the Act in any of the above schools, might, within the

(a) Board of Education Act, 1899, s. 2 (1).

(b) 52 & 53 Vict. c. 76, and by 54 Vict. c. 4, s. 1, and repealed by the Education Act, 1902.

(c) *I.e.* the county fund, borough fund, and district fund or general district rate (see the Act, s. 4):

(d) Local Taxation (Customs and Excise) Act, 1890.

(e) 32 & 33 Vict. (1869) c. 58; 34 & 35 Vict. (1871) c. 60; 36 & 37 Vict. (1873) cc. 41 and 62. (These Acts, together with the Act of 1888, are known as the Public Schools Acts, 1868 to 1873.)



time prescribed by the Act, proceed to make such statutes as it might deem expedient, for determining and establishing the constitution of the future governing body of such school; but that, after such time had expired, all the powers of making statutes with that object should pass to certain 'special commissioners' provided for by the Act (a). This new governing body was to have power to make regulations with respect to the number of the boys, the mode in which they were to be boarded and lodged, the payments to be made for their maintenance and education, the course of study, the powers to be committed to the head master, and the like (b); and was also to have power to make statutes, with regard to a variety of matters connected with the school (c), including the privileges, numbers, and rules for admission of boys on the foundation of the school, who should have rights to education in the school, regulations as to scholarships, exhibitions, and the like, the conditions of the appointment to ecclesiastical benefices vested in the governing body, the number, position, rank, salaries, and emoluments of the masters, and the disposal of the income of the property of the school. Such statutes and regulations, so made by the new governing body, require to be submitted for the approval of the special commissioners, and of His Majesty in Council (d); but the Act provides, that (subject to any vested interests) the head master of every public school to which it applies shall be appointed by, and shall hold his office at the pleasure of, the new governing body, and that all other masters shall be appointed by, and shall hold their offices at the pleasure of, the head master (e).

With respect to endowed *grammar schools*, being schools

(a) S. 5; Act of 1869, s. 1.

(b) Act of 1868, s. 12.

(c) *Ibid.* s. 6.

(d) *Ibid.* s. 9.

(e) *Ibid.* s. 13; *Hayman v. Governors of Rugby School* (1874), L. R. 18 Eq. 28. (This provision seems to deprive assistant masters of any direct claim in respect of their salaries upon the governing body. (*Wright v. M. of Zetland* [1908] 1 K. B. 63.))

for teaching Latin and Greek, or either of such languages (exclusive of the schools to which the Public Schools Acts apply), it was enacted, by the Grammar Schools Act, 1840 (*a*), that, whenever any question came under the consideration of a court of equity, concerning the system of education thereafter to be established in any grammar school, or the right of admission into the same, it should be lawful for that court to make decrees or orders for extending the system of education in the school in question to other useful branches of literature and science, for regulating the right of admission into the school, and for establishing a scheme for the better application of its revenues; due regard being nevertheless paid to the intentions of the founders and benefactors, as well as to other circumstances, and, where any special visitor existed, giving him an opportunity to be heard. In many other respects also, this Act placed the management of such schools under the control of the Court of Chancery; and it provided (*b*) that the jurisdiction should be exercised on petition, according to the provisions of the Charities Procedure Act, 1812 (*c*), with regard to charitable trusts (*d*). By the Endowed Schools Act, 1860 (*e*), the trustees or governors of any endowed school were enabled (subject to a variety of exceptions particularised in the Act) to make orders for the admission to such school of children whose parents were not in communion with the church or sect to which the endowment belonged. But, the relief given by these enactments not being deemed adequate, a Royal Commission issued in the year 1864 to inquire into the education given in grammar and other endowed schools, proprietary schools and private schools; and, the report of this Commission having been in due course laid before

(*a*) 3 & 4 Vict. c. 77.

(*b*) S. 21.

(*c*) 52 Geo. 3, c. 101 (now partially repealed by S. L. R. Act,

1881, s. 3).

(*d*) 3 & 4 Vict. c. 77, s. 21.

(*e*) 23 & 24 Vict. c. 11.

parliament, the recommendations of the commissioners have been gradually carried into effect, under the provisions of a group of statutes known as the Endowed Schools Acts, 1869 to 1908.

Under the provisions of these statutes, there is committed to the Charity Commissioners, whose functions in this respect have now been largely transferred to the Board of Education (*a*), the duty of preparing, after such examination or public inquiry as they may think necessary, draft schemes framed in order to render any educational endowment more conducive to the advancement of education (*b*); and, with this object, these Commissioners may, in such schemes, alter and add to any existing trusts, may make new trusts, directions, and provisions in lieu of those previously existing, and may consolidate or divide any two or more endowments (*c*). Such schemes may also contain provisions for altering the constitution, rights, and powers of the governing body of any educational endowment, and for establishing new governing bodies, corporate or unincorporate; and may remove any governing body, or, if it is incorporated, may dissolve such corporation (*d*); it being the duty of the Commissioners, in every scheme whereby the privileges or educational advantages of any particular class of persons, or of persons in any particular class of life, shall be abolished or modified, to have due regard to their educational interest (*e*), and, so far as conveniently may be, to extend the benefit of endowments to girls as well as boys (*f*).

With regard to the subject of religious teaching, in every scheme (except only such as have reference to

(*a*) Board of Education Act, 1899; Orders in Council, August 7, 1900, July 24, 1901, and August 11, 1902. (See Owen, *Education Acts Manual* (20th edn.), p. 446.)

(*b*) Act of 1869 (32 & 33 Vict.

c. 56), s. 9; *In re Meyricke Fund* (1872) L. R. 7 Ch. App. 500.

(*c*) Act of 1869, s. 9.

(*d*) *Ibid.* ss. 9, 10.

(*e*) *Ibid.* s. 11; Act of 1873, s. 5.

(*f*) Act of 1869, s. 12.

schools maintained out of the endowments of any cathedral or collegiate church, or the scholars whereof are required by the founder to be instructed according to the doctrines or formularies of some particular church, sect, or denomination), there is to be inserted a provision, that the parent or guardian, or person liable for the child's maintenance, may claim the exemption of any day scholar from attending prayer or religious worship or instruction (a); that the religious opinions of any person shall not affect his qualification for being one of the governing body (b); and that no one shall be disqualified for being a master, by reason only of his not being or intending to be in holy orders (c). And every scheme is to provide for the dismissal, at the pleasure of the governing body, of every teacher and officer in the school to which the scheme relates, including the principal teacher, with or without a power of appeal, in such cases and under such circumstances as to the Commissioners shall seem expedient (d).

Every scheme proposed by the Commissioners is to be printed and sent to the governing body, and to the principal teacher, of the endowment to which it relates; and is also to be circulated in such other way as the Commissioners may think proper, in order to give information to all persons interested (e). If any objections to the scheme are made in writing, or any alternative scheme is suggested for consideration, within three months of the publication of the proposed scheme, the Commissioners may hold an inquiry concerning the subject-matter of the proposed scheme (f), and may submit an approved scheme to the Board of Education, by whom it may be either approved or re-framed; the governing body to which the scheme relates, or any person or body corporate

(a) Act of 1869, ss. 15, 16.

(c) Act of 1869, s. 18.

(b) *Ibid.* ss. 17, 19; Act of 1873, s. 6; and *In re Hodgson's School* (1878) L. R. 3 App. Ca. 857.(d) *Ibid.* s. 22.(e) *Ibid.* s. 33.(f) *Ibid.* s. 35.

directly affected (a), who feels aggrieved by the proposed scheme, being at liberty to present a petition against it to His Majesty in Council (b).

A petition against a scheme may, by Order in Council, be referred to the Judicial Committee of the Privy Council, as if it were an appeal (c). If no petition is presented within the time limited, His Majesty may by Order in Council declare his approbation without the scheme being laid before parliament; but if a petition has been presented, the scheme must be laid before parliament. If a scheme has lain before parliament for two months in the same session, and no Address from either House, praying His Majesty to withhold his consent, has been presented, the King may declare his approbation (d).

IV. *Sites for Schools for the Poor, and for Literary and Scientific Institutions.*—The School Sites Act, 1841, was passed to facilitate the conveyance of sites for schools, and, with the undernoted Acts amending it (e), it has provided, that any person legally or equitably entitled in fee simple, in fee tail, or for life, in possession, to any lands of freehold, copyhold, or customary tenure, and having the beneficial interest therein, may grant, by way of gift, sale, or exchange in fee simple, or for a term of years, any quantity of such land not exceeding one acre, as a site for a school to educate poor persons, or for the residence of the master or mistress of such school, or otherwise for the purposes of the education of poor persons in religious and useful knowledge (f). But any such grant, when made by any person entitled for life only, where the person next entitled in remainder in fee simple or in fee tail is legally competent, requires the concurrence of such remainderman; and the grant is

(a) Act of 1869, s. 39.

(b) *In re Shaftoe's Charity*  
(1878) L. R. 3 App. Ca. 872.

(c) Act of 1873, s. 14.

(d) *Ibid.* s. 15.

(e) Act of 1844; Act of 1849;  
Act of 1851; School Grants Act,  
1855.

(f) Act of 1841, s. 2.

in all cases to provide that, upon the land ceasing to be used for the purposes of the grant, it shall revert to the donor (*a*). The like grant may be made by any corporation, ecclesiastical or lay, sole or aggregate; an ecclesiastical corporation sole below the dignity of a bishop obtaining the consent in writing of the bishop of the diocese (*b*). And an allotment may be made for a school site on any inclosure of a common (*c*).

By the School Sites Act, 1852, the provisions of the School Sites Acts are made applicable to such schools or colleges, for the religious or educational training of the sons of yeomen, tradesmen, or others, or for the theological training of candidates for holy orders, as are erected or maintained in part by charitable aid, and in part are self-supporting; ecclesiastical corporations (as regards such grants) being restricted to schools or colleges in union with the Established Church. And, by the Elementary Education Act, 1870, these provisions were also made applicable to the public elementary schools already treated of in this chapter (*d*).

By the Literary and Scientific Institutions Act, 1854 (*e*), it is provided, that the same facilities as are afforded by the School Sites Acts, in respect of schools for poor persons, shall also be available in respect of literary and scientific institutions; subject to the like provisions as are applicable to sites for schools.

The provisions for the acquisition of school sites and the like, are additional to the provisions contained in the Mortmain and Charitable Uses Act, 1888 (*f*), whereby land may be conveyed for similar purposes by deed (to any extent) and by will (to the extent of twenty acres for a public park, two acres for a public museum, and one acre for a schoolhouse); the conveyance, if by deed,

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| (a) Act of 1841, s. 2. (See <i>A.-G. v. Shadwell</i> [1910] 1 Ch. 92.) | Inclosure Act, 1857, s. 13.     |
| (b) Act of 1841, s. 11.  | (d) 33 & 34 Vict. c. 75, s. 20. |
| (c) Inclosure Act, 1845, s. 34;  | (e) 17 & 18 Vict. c. 112.       |
|  | (f) 51 & 52 Vict. c. 42, s. 6.  |

being executed twelve calendar months before the death of the donor, and being enrolled in the books of the Charity Commissioners within six months after the date from which the gift operates.

Finally, under the Technical and Industrial Institutions Act, 1892 (*a*), sites for technical and industrial institutions may, to an extent not exceeding two acres, be freely granted by limited owners, with the consent of the next remainderman, or else with the sanction of the Court ; and every such grant is to be forthwith enrolled with the Charity Commissioners.

V. *Pauper Schools*.—The first class of persons to receive education at the public expense were pauper children maintained in the workhouses. Children who were maintained by the parish under the Poor Law were educated in the workhouses after 1834, in accordance with rules made by the Poor Law Commissioners ; until power was given to the Commissioners, by the Poor Law Amendment Act, 1844 (*b*), to assist in the separation of children from the other pauper inmates by the union of parishes into school districts, in which schools might be established for the reception of the infant poor. Under the provisions of this last-mentioned Act (as amended by the Poor Law (Schools) Act, 1848, and the Poor Law Amendment Acts, 1850 and 1868), parishes and unions may be combined into *school districts*, for the instruction of such of their chargeable infant poor (not being above the age of sixteen) as are orphans, or deserted by their parents, or whose parents or guardians consent to their being placed in such schools ; and a board of managers, consisting of members chosen from the ratepayers of the district, is constituted for every such school district (*c*). The Poor Law (Certified Schools) Act, 1862 (*d*), enables the guardians of any parish or union to send any poor child, being an

(*a*) 55 & 56 Vict. c. 29, s. 7.

(*b*) S. 40.

(*c*) *Ibid.* s. 42.

(*d*) 25 & 26 Vict. c. 43.

orphan or deserted, or else with the consent of his or her parents, to any school, certified as fit for the purpose, supported wholly or in part by voluntary subscriptions, (but not to a reformatory school nor to a school conducted on principles contrary to the particular religious sect or persuasion to which the child may belong), provided the school managers are willing to receive the child; and, also authorises them to pay the expenses incurred for the maintenance, clothing, and education of the child at such school, out of the funds in their possession, to the extent, at least, of what the child's maintenance in the workhouse would have cost them during the same period. In the case of the children of persons in receipt of out-door relief, payment of school fees by the guardians was provided for by the Education Acts; and free education is now, as we have seen, provided by the Elementary Education Act, 1891, for all children. It is (as we have also seen) the duty of the school authority to provide efficient elementary education for blind and deaf children not resident in a workhouse or boarded out (a). Such children may also be sent to suitable institutions by the guardians in whose workhouse they are, or by whom they have been boarded out, under the Poor Law (Certified Schools) Act, 1862, already referred to.

VI. *Reformatory and Industrial Schools*.—Reformatory and industrial schools were originally institutions of a private nature, founded by philanthropic persons for educating and training in industry children and young persons who had become, or were likely to become, criminals. They are now, however, largely supported by contributions from prison authorities and from the Treasury; and are regulated by statute. They are, however, for the most part, if not entirely, still owned and managed privately; and, though county councils and county borough councils are empowered (with the

(a) Elementary Education (Blind and Deaf Children) Act, 1893.



approval of the Secretary of State) to establish them (*a*), they do not appear to have made use of this power. Instead of doing so, they contribute to the support of those founded by private effort, and contract with the managers for the reception of inmates.

The law with regard to these schools is now contained in Part IV. of the Children Act, 1908 (*b*), which repeals and consolidates the earlier Acts.

The main difference between 'reformatory' and 'industrial' schools is, that the former are intended for the industrial training of young persons who have already embarked on a career of crime, whereas the latter are intended for those whose surroundings are such that they are in danger of doing so. Accordingly, detention in a reformatory school is awarded as part of, or in lieu of, other punishments, whereas detention in an industrial school may be ordered in many cases where the young person has committed no offence.

A reformatory school is defined as "a school for the industrial training of youthful offenders, in which youthful offenders are lodged, clothed, and fed, as well as taught." An industrial school is defined as "a school for the industrial training of children, in which children are lodged, clothed, and fed, as well as taught" (*c*). In these definitions a 'child' means a person under the age of fourteen years (*d*). A 'day industrial school' is one in which industrial training, elementary education, and one or more meals a day are provided, but not lodging (*e*).

Reformatory and industrial schools (including day industrial schools) may, upon application of the managers, be inspected by an inspector appointed by the Home Secretary; and, if the report is satisfactory, may be 'certified.' When certified, they are subject to annual inspection, and, so long as the certificate is not

(*a*) Children Act, 1908 (8 Edw.

7, c. 67), s. 74 (7), (8).

(*b*) 8 Edw. 7, c. 67.

(*c*) *Ibid.* s. 44.

(*d*) *Ibid.* ss. 131, 123.

(*e*) *Ibid.* s. 77.

withdrawn, they are called 'certified schools,' and are subject to the statutory regulations contained in the Children Act, 1908 (*a*).

When a youthful offender, whose age is between twelve and sixteen years, is convicted of an offence for which, if he were an adult, he might be sentenced to imprisonment or penal servitude, the Court may send him to a certified reformatory school, instead of sending him to prison, for a period of not less than three, nor more than five, years. He cannot, in any case, be kept there after he is nineteen (*b*); but he may, before the expiration of his term, be let out on licence, or, with his consent, be apprenticed or disposed of in any trade, calling, or service, or by emigration. (*c*) And, after the expiration of his term, he remains under the supervision of the managers till he is nineteen (*d*).

The children who may be sent to industrial schools or day industrial schools are those who are apparently under fourteen years of age, and are found begging or wandering without a settled home, or frequenting the company of thieves or common prostitutes, or who are destitute or under the care of parents or guardians of drunken or criminal habits; also children under twelve who are charged with an offence punishable, in the case of an adult, with penal servitude or a less punishment (*e*). Children may also be sent to industrial schools, at their parents' request, if their parents cannot control them (*f*); and children maintained in workhouses if they are refractory (*g*). A child can be sent to an industrial school for such time as the Court thinks proper; but not beyond the time when he or she will attain the age of sixteen years (*h*). Provision is, however, made for his supervision

(*a*) 8 Edw. 7, c. 67, ss. 45-51,  
77.

(*b*) *Ibid.* ss. 57, 65.

(*c*) *Ibid.* ss. 67, 70.

(*d*) *Ibid.* s. 68.

(*e*) *Ibid.* ss. 58, 78.

(*f*) *Ibid.* s. 58 (4), 78.

(*g*) *Ibid.* s. 58 (5), 78.

(*h*) *Ibid.* s. 65.

by the managers after he leaves the school, until he reaches the age of eighteen (a).

Reformatory and industrial schools, even when certified, maintain their voluntary character to this extent, that the managers may decline to receive any youthful offender or child ; but, when once they have accepted him, they are bound to teach, train, lodge, clothe, and feed him during the whole period for which he is liable to be detained (b).

It is the duty of the council of the county or county borough in which a youthful offender resides, and of the education authority in which a child sent to an industrial school resides (unless sent at the instance of guardians of the poor, or at the desire of his parent or guardian, as being a child whom such parent or guardian cannot control), to provide for his reception and maintenance in a certified school (c) ; and, for the performance of this duty, a local authority may contract with the managers of any certified school for the reception and maintenance of youthful offenders or children, and may undertake or contribute to the establishment and management of such schools, out of the county or borough funds, or (in the case of an education authority) as part of the expenses of elementary education (d). Moreover, as we have seen (e), the parents of a youthful offender or child sent to a certified school may be ordered to contribute the cost of his maintenance when they are able to do so (f), and the Treasury is empowered to make further contributions out of moneys provided by Parliament (g).

(a) Act of 1908, s. 68.

(b) *Ibid.* s. 52.

(c) *Ibid.* s. 74.

(d) *Ibid.* s. 74.

(e) See *ante*, vol. ii., p. 442.

(f) Act of 1908, s. 75.

(g) *Ibid.* s. 73.

## CHAPTER IV.

## OF THE LAWS RELATING TO PRISONS.

By the Assize of Clarendon, in the reign of Henry II., provision was first made for the erection of gaols in each county, wherein the sheriff might lodge prisoners. In 1402 (by 5 Hen. IV. c. 10), it was enacted, that justices should only imprison men in 'the common gaol.' In the seventeenth and eighteenth centuries, the provision of better gaols was made a charge on the county. In the nineteenth century, the prison system was completely reformed; its cost and management being transferred almost entirely from the local authorities to the central government.

A prison may not be erected, save by the authority of parliament (a); and when once erected, it belongs to the King (b), as representing the executive government of the country. Moreover, the gaoler, governor, keeper, or other chief officer of a prison was formerly, in contemplation of law, considered merely as the deputy of the sheriff of the county or place in which the prison was situate; and consequently, if he negligently suffered a prisoner to escape out of his custody, the sheriff (as his principal) was held responsible. Under the existing law, however, every prisoner is deemed to be in the legal custody of the gaoler himself; so that the sheriff is no longer liable for his escape. And the governor of the prison is responsible for the proper and legal custody of the

(a) 2 Inst. 700; Bac. Abr. *Gaol* shire (1839) 11 A. & E. 144.  
 (A.); *R. v. Justices of Lanca-* (b) 2 Inst. 589.

prisoner (a). Every prison officer has the privileges of a constable (b).

There is a species of prison which is termed, by way of distinction from a gaol properly so called, a 'house of correction,' or (in the City of London) a 'bridewell,' and sometimes a 'penitentiary' (c). Houses of correction were established in the reign of Elizabeth, and were originally designed for the penal confinement of paupers refusing to work, and of other persons falling under the legal description of *vagrants* (d); and at first this was the only purpose for which houses of correction might be used, the common gaol having long been the only legal place of commitment for persons convicted of offences or awaiting their trial (e). Eventually, however, by the Prison Act, 1835. (f), it was enacted, that either a justice of the peace, or a coroner, might commit prisoners awaiting their trial to any house of correction situate near the place where the assizes or sessions were to be held, at which they were to be tried; and subsequently 'police stations' and 'lock-up' houses were successively established, for the temporary detention of persons charged with offences.

It was, however, still provided, by the Criminal Justice Administration Act, 1851 (g), that every prisoner committed in the first instance otherwise than to the common gaol should be, in due course, removed to the common gaol to take his trial. But the importance of the distinction between gaols and houses of correction has now been in a great measure done away with, by the Prison Act, 1865 (h), which enacts (i) that, subject to the provisions of that Act with respect to the appropriation of

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| (a) Prison Act, 1865, s. 58.   | (d) 39 Eliz. (1597) c. 4.                         |
| (But see Sheriffs Act, 1887 (50 & 51 Vict. c. 55), s. 16; <i>Mee v. Cruikshank</i> (1903) 86 L. T. 708; <i>Demer v. Cook</i> (1905) 88 L. T. 629.) | (e) 5 Hen. 4 (1402) c. 10; 23 Hen. 8 (1531) c. 2. |
| (b) Prison Act, 1898, s. 10.   | (f) Ss. 3, 4.                                     |
| (c) Prison Act, 1865, s. 4   | (g) Ss. 20, 21.                                   |
|  | (h) 28 & 29 Vict. c. 126.                         |
|  | (i) S. 56.  |

prisons to different classes of prisoners, every prison to which the Act applies shall be deemed to be both a gaol and a house of correction. The Prison Act, 1877, gives the Secretary of State a general authority to appoint the particular prisons in which prisoners shall be confined, both before and during their trial, and after conviction (a); moreover, prisoners may be removed from one prison to another, for the purposes of their trial. In the Prison Act, 1898 (b), the expression 'local prison' is used, and means "any prison to which the Prison Acts, 1865 to 1893, apply."

The maintenance and government of prisons is now mainly provided for by the Prison Acts, 1865 to 1902, by which Acts the statute law on this subject has been in some measure consolidated. By the Prison Act, 1865, every place having a separate prison jurisdiction (*i.e.*, speaking roughly, every county, riding, hundred, liberty, borough, or town) was placed under the legal liability of providing, at its own expense, adequate accommodation for its own prisoners; and the duty of seeing that this result is attained was entrusted to the *prison authority*, that is to say, the justices of the county, the council of the borough, or otherwise, as the case might be (c). But, in the counties, this duty has been transferred from the justices to the county council, by the Local Government Act, 1888 (d). The Prison Acts make careful provision for the religious instruction of prisoners during the period of their incarceration; enacting that there shall be appointed a chaplain and, if necessary, an assistant chaplain for each prison, both being clergymen of the Established Church, and duly licensed in that behalf by the bishop (e). Further, a chapel, or suitable room, is

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| <p>(a) 40 &amp; 41 Vict. c. 21, ss. 24, 25.</p> <p>(b) 61 &amp; 62 Vict. c. 41, s. 14.</p> <p>(c) S. 5. A place has a "separate prison jurisdiction" which either in fact maintains,</p> | <p>or (but for other accommodation being provided for it) would be liable at law to maintain, a separate prison for itself (s. 9).</p> <p>(d) 51 &amp; 52 Vict. c. 41, s. 3.</p> <p>(e) Prison Act, 1865, ss. 10, 13.</p> |
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to be provided in every prison, in which prayers (selected from the liturgy of the Established Church) and portions from the Scriptures may be read daily, either by the chaplain himself, or by the gaoler, or by some other person selected for the purpose. For prisoners who do not belong to the Established Church, a minister of the persuasion to which such prisoners belong may be appointed, and a reasonable recompense awarded to him for his services (a). All prisoners are required to attend divine worship; and those who desire it may receive additional religious and moral instruction.

For the general management of prisons, and their maintenance, and the discipline to be exercised by the prison officials over the prisoners, very exact and minute provisions have been laid down in the Prison Acts, more particularly in the Prison Acts, 1865, 1877, and 1898. Under the Act of 1877, all the expenses incurred in the maintenance of those prisons to which the Act applies (that is to say, all prisons which belong to any 'prison authority' as defined by the Act of 1865), as well as the expense of keeping the prisoners therein, are to be defrayed out of moneys to be provided by parliament, instead of, as theretofore, by local rates; and the continuance or discontinuance of any particular prison or prisons, the appointment of all prison officers, the control and safe custody of the prisoners, and all powers and jurisdictions exercisable by prison authorities, or by the justices in sessions assembled, in relation to prisons within their jurisdiction, are thereby entrusted or transferred to the Secretary of State (b). To assist the Secretary of State in the due execution of this part of his office, the Act of 1877 established a Board of Prison Commissioners, in whom (subject to his control) the general superintendence of all prisons under the Act is

(a) Prison Rules, 1899, ss. 41–64 (S. R. & O. 1899, pp. 1153–57).

(b) Act of 1877, ss. 4, 5; *Mullins v. Treasurer of Surrey* (1880) 6 Q. B. D. 156.

vested. The Prison Commissioners are now, also, by virtue of their office, directors of convict prisons (*a*), and are to be assisted by inspectors and other officers (*b*); and they, or their officers, are to visit and inspect the different prisons, and examine into the state of the buildings, the conduct of the officers, the treatment and conduct of the prisoners, their labour and earnings (*c*), and similar matters, and inquire into all alleged abuses. The specific powers and jurisdictions conferred upon 'visiting justices,' either at common law or by charter or statute, have been transferred to the Prison Commissioners, who are to make from time to time reports upon each prison to the Secretary of State; and their annual report is to be laid before both Houses of Parliament (*d*). Under the Prison Act, 1884, the Secretary of State may, with the approval of the Treasury, alter, enlarge, or rebuild any prison; or build any new prison; or appropriate for a new prison any building or part thereof vested in him (*e*); and thereupon may declare such new prison to be a prison under the Prison Acts, and to be within the jurisdiction of the Prison Commissioners, and to be a prison for the county, or other prison jurisdiction, named in the declaration.

The Act of 1898 regulates the corporal punishment

(*a*) Act of 1898, s. 1. The Directors of Convict Prisons were formerly a separate body, charged with the special superintendence of prisons used for the reception of convicts serving sentences of penal servitude. They were amalgamated with the Prison Commissioners by the Act of 1898.

(*b*) Act of 1877, ss. 6, 7; Act of 1898, s. 1.

(*c*) It being supposed that prison-made goods interfere with the sale of goods manufactured out of prison, it has been recently

enacted that goods made in foreign prisons may be excluded from importation (Foreign Prison-made Goods Act, 1897).

(*d*) Act of 1877, s. 10. The 'visiting justices' appointed by the Prison Act, 1865, are now represented by the 'visiting committee of justices'; and the visiting committee exercises such duties as are from time to time delegated to it by the Secretary of State (Act of 1877, ss. 13-15).

(*e*) S. 2.



which may be inflicted on convict prisoners for prison offences ; and enacts, that such punishment shall not be inflicted, unless for mutiny or incitement to mutiny, or unless for gross personal violence to any prison official, in any cases save two, viz., (1) in the case of offences committed by prisoners who have been convicted of felony, or who have been sentenced to penal servitude or to hard labour ; and (2) in the case of offences duly established after a fair trial before a special tribunal appointed for the purpose (a). The Act contains also provisions for the separation of prisoners of different degrees or qualities (b) ; and it enacts, that prisons need not have punishment cells, but only special cells for the temporary confinement of refractory or violent prisoners (c). There are other provisions of the like humane character.

A 'visiting committee' of justices is appointed for every prison, to deal with prisoners charged with serious misconduct. The committee has power (subject to the approval of the Home Secretary) to order the corporal punishment of prisoners guilty of mutiny or gross personal violence. It inquires into complaints made by prisoners, assists in their classification, and discharges various other functions in connection with the administration of prisons. The visiting committee is appointed annually at quarter sessions in counties, and at special sessions in boroughs (d).

*Convict Prisons.*—The convict prisons are Dartmoor, Maidstone, Portland, Parkhurst, and Aylesbury. They are entirely under the control of the central government ; but there is a board of visitors for each appointed by the Home Secretary, with functions similar to those of the visiting committees of local prisons. Convict prisons are reserved for prisoners sentenced to penal servitude—a

(a) Act of 1898, s. 5.

(b) *Ibid.* s. 6.(c) *Ibid.* s. 7.

(d) Prison Act, 1877, ss. 13, 14 ; Prison Act, 1898, s. 5.

punishment which, in 1857, was substituted for transportation (a).

The Prevention of Crime Act (b) enables the Secretary of State to establish Borstal institutions (c), that is to say, places in which young offenders whilst detained may be given industrial training and other instruction, and may be subject to such disciplinary and moral influences as will conduce to their reformation, and empowers him to transfer to such institutions persons between sixteen and twenty-one years of age sentenced to penal servitude or imprisonment. Courts are also empowered to send to Borstal institutions, for periods of not less than one nor more than three years, any person convicted on indictment and liable to be sentenced to imprisonment or penal servitude, if he is between sixteen and twenty-one years of age, and it is expedient to do so by reason of his criminal habits or tendencies, or his association with persons of bad character.

(a) The Penal Servitude Act, 1853, substituted penal servitude for transportation for periods of less than fourteen years. The Penal Servitude Act, 1857, abolished transportation altogether, and substituted penal servitude for all sentences of transportation.

(b) 8 Edw. 7, c. 59.

(c) So named from Borstal in Kent, where the first institution of the kind was, by order of the Home Secretary (16 July, 1874), appointed to be a place of confinement for male offenders sentenced to penal servitude.

## CHAPTER V.

## OF THE LAWS RELATING TO HIGHWAYS AND BRIDGES.

## A. HIGHWAYS.

*Definition of Highways.*—A highway may be defined as a passage which is open to all the King's subjects (*a*). The rights of the public thereon are limited to those of passing and repassing (*b*); the ownership of the soil not being changed by the existence of the highway (*c*). It is not essential to the existence of a highway that it should be a thoroughfare; it may be a *cul de sac*. But as against presuming the existence of a public highway in such a case, "it is always a strong observation to a jury "that the way leads nowhere" (*d*). On the other hand, the passage must be a more or less defined way, leading from somewhere to somewhere; a right to roam at large is a right unknown to the law (*e*). The boundary of the highway, where there are fences on each side of it, is presumed to be such fences; if there is nothing to show that they were not put up as such boundaries (*f*). But the extent of a highway is always a question of fact.

(*a*) See Highways Act, 1835, s. 5—"all roads, bridges (not "being county bridges), carriage-ways, cartways, horseways, "bridleways, footways, cause-ways, churchways, and pavements."

(*b*) *Harrison v. D. of Rutland* [1893] 1 Q. B. 142.

(*c*) As to 'vesting' of highways in urban districts, and of main roads in public bodies, see *post*, p. 92.

(*d*) *Bateman v. Bluck* (1852) 18 Q. B. 870; *A.-G. v. Antrobus* [1905] 2 Ch. 188; *Whitehouse v. Hugh* [1906] 2 Ch. 283. (Dedication of a *cul de sac* is seldom, if ever, inferred from mere user.)

(*e*) See the cases last cited and *Brinckman v. Matley* [1904] 2 Ch. 313; *Behrens v. Richards* [1905] 2 Ch. 614.

(*f*) *Offin v. Rochford R. D. C.* [1906] 1 Ch. 342; *Copestake v.*

*Creation of Highways.*—A highway may be, or may have been, created under an Act of Parliament. In default of such an Act, a highway can only be created by the dedication by the owner of the soil of a right of passage to the public. Such dedication may be express or implied. Express dedication arises when the owner of land does any act which unequivocally indicates an intention to give the public a right of passage; for instance, throws open a path or a newly formed street joining one road to another (a). Dedication may be inferred from the fact that the highway has been used by the public openly, and as of right, and for so long a time that it must have come to the knowledge of the owner that the public were so using it of right (b). The length of time during which it must have been used to raise the presumption of dedication varies; a longer time would be required in the case of a non-resident than of a resident owner (c). The period of four, and again of six years, has been held sufficient (d). It is doubtful whether a 'limited owner,' e.g., a tenant for life, can dedicate to the public, either expressly or by implication, land which he holds as such; but long-continued user by the public throws on the person denying the existence of the highway the *onus* of showing that no dedication could have been lawfully made (e). The Prescription Act, 1832, has no application to public highways.

Restrictions may be placed on the dedication by the owner. For instance, he may dedicate the way as a foot-way only, and not as a carriage-way or bridle-way. Or again, he may dedicate subject to his right to maintain

*West Sussex County Council* [1911] 2 Ch. 331.

(a) See *R. v. Lloyd* (1808) 1 Camp. 260; *Woodyer v. Hadden* (1813) 5 Taunt. 124.

(b) See *Greenwich Bd. of Works v. Maudslay* (1870) L. R. 5 Q. B., at p. 404; *A.-G. v. Watford Rural Council* [1912] 1 Ch. 417.

(c) See *Chinnock v. Hartley Wintney R. D. C.* (1899) 63 J. P. 328.

(d) *Rugby v. Merryweather* (1790) 11 East 375 n.; *Jarvis v. Dean* (1826) 3 Bing. 447.

(e) *Farquhar v. Newbury R. C.* [1909] 1 Ch. 12.

existing obstructions in it (a) ; or to plough it up at certain times of the year (b) ; or to carry on a market thereon.(c). Or he may dedicate to the public a right of footway over a road, over which he has already granted to certain persons a private right of carriage-way (d). But once a way has been dedicated to the public, the dedication cannot be revoked. " Once a highway, always a highway " (e).

*Liability to Repair.*—The moment a way became a highway, *eo instanti*, the parish at common law became *primâ facie* liable to repair it (f). This liability was enforced by indictment of the inhabitants of the parish. Various statutes have, for administrative reasons (g), given to other local authorities powers as highway authorities. But by no statute has this ultimate liability of the parish to repair highways repairable by the inhabitants at large been removed ; and the liability of the parish for repairs remains the underlying principle of highway law. No standard of repair is fixed by law as the duty of the parish. The road must be kept reasonably passable for the ordinary traffic of the neighbourhood ; whether it is so or not is a question for the jury on the trial of the indictment (h). Our inquiry, therefore, must be directed to the following points :—(1.) what highways are now repairable by the inhabitants at large ; (2.) who are the present highway authorities ; (3.) what are the powers and duties of the highway authorities, and how can such

(a) *Davies v. Stephens* (1836) 7 C. & P. 570 ; *Fisher v. Prowse* (1862) 2 B. & S. 770.

(b) *Mercer v. Woodgate* (1869) L. R. 5 Q. B. 26 ; *Arnold v. Blaker* (1870) L. R. 6 Q. B. 433.

(c) *A.-G. v. Horner* (1885) L. R. 11 App. Ca. 66.

(d) *Duncan v. Louch* (1845) 6 Q. B. 904 ; *R. v. Chorley* (1848) 12 Q. B. 515.

(e) *Harvey v. Truro R. D. C.*

[1903] 2 Ch. 638.

(f) *R. v. Broughton* (1771) 5 Burr. 2700 ; *R. v. Sheffield* (1787) 2 T. R. 111 ; *Eyre v. New Forest* (1892) 56 J. P. 517.

(g) *R. v. Heath* (1866) L. R. 1 Q. B. 218, *per curiam*.

(h) *R. v. High Halden* (1859) 1 F. & F. 678 ; *Burgess v. Northwich* (1880) 6 Q. B. D. 264 ; *A.-G. v. Stafford C. C.* [1905] 1 Ch. 336.

duties be enforced. The discussion will close by a consideration of the methods of diverting highways, and of nuisances and extraordinary traffic upon highways.

(1.) *What highways are repairable by the inhabitants at large.*—At common law, the liability of the parish was extinguished if the parish could show, either that by an Act of Parliament some other body or person (such as turnpike trustees) was made liable in express substitution for the parish (a); or that some other person was liable *ratione tenuræ* or *ratione clausuræ*. Liability *ratione tenuræ* may attach to occupiers of land adjoining the highway by reason of their tenure of such land; and it is an obligation running with the land and every part of it. This obligation is generally proved by evidence that the occupiers have, for a great length of time, in fact repaired the highway; such conduct, unexplained, being almost conclusive (b). Liability *ratione clausuræ* arises in cases of inclosures by the owner of land adjoining a highway which formerly ran over open country. In such case, if the public had acquired an immemorial right of deviation over the adjoining land when the road was impassable, the owner, by enclosing the adjoining land, renders himself liable *ratione clausuræ* to repair the highway (c). But this liability does not arise in the case of a modern highway, where the extent of the land dedicated is known, and the circumstances of the case exclude the right of deviation (d).

Many highways which were formerly repairable *ratione tenuræ*, or *ratione clausuræ*, have now become repairable by the highway authorities in perpetuity, either under an order of justices made under s. 62 of the Highway Act, 1835, or under agreements made between those authorities and the persons formerly liable to repair. When such

(a) *R. v. Netherthong* (1818) 2 B. & A. 179; *R. v. Brightside* (1849) 13 Q. B. 933. (c) *Duncomb's Case* (1634) 1 Roll. Abr. 390.

(b) *R. v. Hatfield* (1820) 4 B. & A. 75. (d) *R. v. Ramsden* (1858) E. B. & E. 949.

agreements have been made in accordance with the statutory provisions in that behalf (*a*), in consideration of a money payment, the persons formerly liable *ratione tenuræ* or *ratione clausuræ*, and their lands, are entirely freed from the liability (*b*).

By the Highway Act, 1835 (*c*), a great limitation was put upon the number of roads repairable by the inhabitants at large. By that statute, no road made after 1835 by any private person or corporation is to become repairable by the inhabitants at large; unless the same has been made in a manner satisfactory to the highway authority, and been formally adopted, as a highway repairable by the inhabitants at large, by the authorities mentioned in that Act (*d*). By several later Acts, however, highways may become repairable by the inhabitants at large. Thus justices may, on the application of a rural district council, declare a private road repairable with the consent of the owner in return for its being made public (*e*), an urban or rural authority may agree with an owner of lands for making of roads at his expense, to become, when made, repairable by the inhabitants (*f*); and an urban authority may declare a street within its district when made up a repairable highway (*g*), and may in certain circumstances itself make new streets (*h*).

(*a*) Highway Acts, 1862, s. 35; 1894, s. 25.

1864, s. 24; Public Health Act, 1875, s. 148; Local Government Act, 1894, s. 25.

(*b*) *In re Stamford and Warrington* [1911] 1 Ch. 648.

(*c*) 5 & 6 Will. 4, c. 50, s. 23.

(*d*) *Ibid.* s. 23. See *R. v. Dukinfield* (1863) 32 L. J. M. C. 230; and Local Government Act, 1894, ss. 6 (1), 19 (4).

(*e*) Highway Act, 1862, s. 36; Local Government Act, 1894, s. 25.

(*f*) Public Health Act, 1875, s. 146; Local Government Act,

(*g*) Public Health Act, 1875, s. 152; Private Street Works Act, 1892, s. 19. Under s. 20 of the last mentioned Act in places where it applies (see s. 2) the local authority *must* declare a street repairable when it has been properly made up, and an application has been made by the majority in value of the owners of houses and land in the street.

(*h*) Public Health Act, 1875, s. 154. Housing of the Working Classes Act, 1890, s. 12 (3).

But unless a highway made since 1835 has become repairable in one of these ways, or under some other statutory provision, it is not repairable by the inhabitants, though the public have the right to use it as a highway; and, in fact, there are many highways for the repair of which no one is responsible (*a*). Special provisions now exist for the repair of the class of highways now known as main roads (*b*).

(2). *The present highway authorities*.—The Highway Act, 1835, provided for the appointment by every parish of a surveyor, whose principal duty was to keep in repair the highways in the parish for which he was appointed (*c*). If he failed in this duty, he was liable to a fine of 5*l.* (*d*). The Highway Act of 1862, and subsequent amendments thereof, provided for the formation of highway boards in rural districts, in substitution for the parish surveyor; and invested them with all the powers, duties, and liabilities of the surveyor (*e*). These highway boards, where formed, exercised for their district substantially the same powers, and had substantially the same liabilities for the district, as the surveyor of a parish had for the parish (*f*). But neither the appointment of a surveyor, nor the formation of a highway board, relieved the parish of its common law liability to indictment. The object of the legislature in passing these Acts was simply “to extend the area of management, to equalise the costs of repair, and to simplify the machinery for providing the necessary

(*a*) See *Eyre v. New Forest* (1892) 56 J. P. 517.

(*b*) See *post*, p. 89.

(*c*) Highway Act, 1835, s. 6.

(*d*) *Ibid.* s. 94. See also s. 18. This latter section only applies where the liability to repair is not in dispute. If it is in dispute, the justices must direct a bill of indictment to be preferred against the inhabitants of the parish, or “the party to be

named in such order”—presumably a person alleged to be liable *ratione tenuræ* or *clausuræ*. There is no ground for supposing that a district or borough council can be thus indicted. On the contrary, see *R. v. Wakefield* (1888) 20 Q. B. D. 810.

(*e*) Highway Act, 1862, ss. 7, 14, 11, 43.

(*f*) *Ibid.* s. 12.



“funds.” At the present day, the functions and liabilities of the surveyors of highways and of highway boards have been transferred to the sanitary authorities throughout the kingdom. In urban districts, the urban sanitary authority (*a*), exclusively of any other person, executes the office and duty, and is subject to the liabilities of the surveyor of highways (*b*). In rural districts, highway boards have also ceased to exist; and there have been transferred to the rural district council all the powers and liabilities of the highway board, where one existed, or, where a highway board had not been formed, of the surveyors of highways within their district. The expenses of repairing the highways are payable in urban districts generally out of the general district rate, and in rural districts out of the poor rate (*c*).

To one class of highways the foregoing remarks do not apply. The ‘main roads’ in the county are not in general repaired by the district councils, but are wholly maintained and repaired by the county council (including therein the councils of county boroughs); which have the same powers and duties in respect thereto that a highway board had (*d*). On the formation of county councils, urban authorities could claim to retain main roads; and, by agreement (*e*) with the county council, any district council may, in consideration of an annual payment (*f*), undertake the repair and maintenance of any main road.

A main road is defined as being any road which in 1888 was, for the time being, a main road within the meaning of the Highways and Locomotives Amendment Act, 1878.

(*a*) *I.e.* the urban district council (see Local Government Act, 1894, s. 21); or, in a borough, the borough council (Public Health Act, 1875, s. 6).

(*b*) Public Health Act, 1875, s. 144.

(*c*) *Ibid.* s. 216; Local Government Act, 1894, s. 29.

(*d*) Local Government Act, 1888, s. 11.

(*e*) *Southampton C. C. v. Inland Revenue Commissioners* (1905) 3 L. G. R. 1060; 92 L. T. 364.

(*f*) *Sandgate U. D. C. v. Kent C. C.* (1898) 79 L. T. 425.

Main roads under that Act consist of two classes. First, any road which was a turnpike road, and has, since 1870, ceased to be a turnpike road (a). Historically, turnpike roads were the most important roads in the kingdom, and were first constructed as turnpike roads about the middle of the eighteenth century. Persons subscribed among themselves with a view either to the repair of existing roads or to making and keeping in repair new roads; and, under powers vested in them by Acts of Parliament, erected gates on such roads, and took tolls from the persons who passed through them. The distinctive mark of a turnpike road thus was, that these roads had toll-gates upon them, and that a right existed to turn back any one who refused to pay toll upon them (b). Turnpikes could only be erected on existing highways by virtue of statute; and, in general, Turnpike Acts were only made for a limited period. Turnpike roads are now practically extinct, having been ‘disturnpiked’ under the provisions of various statutes. The second class of main roads are those that the county authority had declared before 1888 (c), or the county council may (d) from time to time declare, to be main roads, on the ground that any such road, as a “medium of communication between “great towns, or a thoroughfare to a railway station, or “otherwise” ought to become a main road (e).

(3.) *Powers and duties of highway authorities*.—To the district and borough councils there have therefore been transferred the duties of the surveyors of highways to repair the highways, together with the powers of paying the necessary expenses out of moneys raised by rates. There have not, however, been transferred to them the liabilities of the *parish*. It is the parish, and not the borough or

(a) Highways and Locomotives Act, 1878, s. 15.  
Act, 1878, s. 13.

(b) *Northam Bridge Co. v. London and Southampton Rail.*

Co. (1840) 6 M. & W., at p. 438.

(c) Highways and Locomotives

Act, 1878, s. 15.  
(d) Local Government Act, 1888, s. 11.

(e) Highways and Locomotives Act, 1878, s. 15.

district council, which is still indictable for non-repair (a) ; for the borough has succeeded only to the liability of the surveyor, who was only liable to pay a penalty of 5*l.* (b) on summary conviction, and not to be indicted (c). One form of indictment only can be brought against the district or borough councils ; and that is a statutory indictment under section 10 of the Highways and Locomotives Act of 1878 (d). Under that section, the county council may, when a highway is out of repair and a local authority denies its liability to repair it, direct a bill of indictment to be preferred to the next practicable assizes, with a view to try the liability of the defaulting authority.

As regards main roads, the position may be slightly different, inasmuch as there has been wholly transferred to the county council the liability to maintain and repair them (e) ; and it may be that this provision would be an answer to an indictment of a parish for non-repair of a main road. But this is very doubtful (f).

If, then, these highway authorities cannot be indicted for neglect of their duties, still less can an action for damages be brought against them by a person who has suffered damage by reason of their neglect of duty. An action for damages for non-feasance, in the matter of road repairing, could not, and cannot, be brought, even against a parish (g) ; *a fortiori* it cannot be brought against a local authority (h). An action for damages can, however, be brought against a local authority, as much

(a) *R. v. Mayor of Poole* (1887) 19 Q. B. D. 602.

(b) *Ante*, p. 88.

(c) *Young v. Davis* (1862) 7 H. & N., at p. 774.

(d) *R. v. Mayor of Wakefield* (1888) 20 Q. B. D. 810 ; and see *Loughborough v. Curzon* (1886) 16 Q. B. D. 565 ; 17 Q. B. D. 344.

(e) Local Government Act, 1888, s. 11.

(f) See *A.-G. v. Staff. C. C.* [1905] 1 Ch. 336, for a discussion of this question in argument, where the authorities are collected.

(g) *Russell v. Men of Devon* (1788) 2 T. R. 667.

(h) *Young v. Davis* (1862) 7 H. & N. 774 ; *Cowley v. Newmarket L. B.* [1892] A. C. 345 ; *Maguire v. Liverpool Corporation* [1905] 1 K. B. 767.

as against any other person, for particular damage resulting from *misfeasance* on a highway (a); and often it is difficult to distinguish between non-feasance and misfeasance.

At common law, the soil of a highway remains vested in the person who dedicates it to the public, and his successors in title. The public only acquire by the dedication the right of using the highway, not any title in the soil. But by the Public Health Act, 1875 (b), highways in urban districts, if repairable by the inhabitants at large, vest in the urban district or borough council as highway authority, and main roads (except when repaired by urban authorities) vest in the county councils (c). This vesting gives to the local authority a proprietary right (d) in the soil of the highway, and the pavements, stones, and other materials thereof; but only in that part of it used actually as a highway, namely, the surface and that which lies beneath, in so far as it constitutes the made part of the highway (e). And it is very doubtful whether the vesting of the way in reality substantially enlarges the rights which would otherwise be incident to the authority as a highway authority (f). In rural districts, the soil of highways (other than main roads) remains, as at common law, vested in the persons who dedicated them. When, as is often the case, the ownership is not known, it is presumed to be in the owners of the adjoining lands.

It is incident to the duties of a highway authority to protect all public rights of way, remove obstructions,

(a) *Bull v. Shoreditch Borough Council* (1904) 2 L. G. R. 756.

(b) Public Health Act, 1875, s. 149.

(c) Local Government Act, 1888, s. 11.

(d) *Tunbridge Wells v. Baird* [1896] A. C., at 442; *Westminster City Council v. Johnson* [1904] 2 K. B. 737.

(e) *Wandsworth v. United Telephone* (1884) 13 Q. B. D. 904; *Finchley v. Finchley* [1903] 1 Ch. 441.

(f) See *Wednesbury Corporation v. Lodge Holes Co.* [1905] 2 K. B. 833. (Judgment of Jelf, J. reversed in C. A., but restored in House of Lords, [1908] A. C. 323.)

abate encroachments, and institute legal proceedings with such objects (a). Where a highway is repairable by some person *ratione tenuræ*, the district council may, after notice, put the way in repair, and sue the occupier for the cost (b).

Any injury to a highway, by which a highway is rendered less commodious to the persons using it, is a nuisance and an indictable offence at common law; and is also summarily punishable (c). And any person who is prevented by an obstruction from using the highway may abate the nuisance so far as is reasonably necessary to enable him to use the highway; but he cannot do more than this (d).

Locomotives on highways, though at first treated as nuisances, are now permitted, subject to the provisions, and within the limits, prescribed by statute (e). These statutes in no way permit a locomotive to be used so as to be a nuisance or injurious to the highway (f). Apart from this duty imposed on all persons not to injure the highway by causing a nuisance, statute (g) has enabled the local authority, in cases where extraordinary (h) expenses have been incurred in repairing a highway by reason of the damage caused by excessive weight (i) or extraordinary traffic thereon, to recover from any person,

(a) Highway Act, 1835, ss. 64–69; Act of 1864, ss. 1, 24; Local Government Act, 1894, s. 26.

(b) Local Government Act, 1894, s. 25 (2); *Daventry v. Parker* [1900] 1 Q. B. 1.

(c) Highway Act, 1835, s. 7; *Smith v. Perry* [1906] 1 K. B. 262.

(d) *Dimes v. Petley* (1850) 15 Q. B. 276.

(e) Locomotives Acts, 1861 (24 & 25 Vict. c. 70); 1865 (28 & 29 Vict. c. 83); 1878 (41 & 42 Vict. c. 77, Part ii.); Motor Car Acts, 1896 (59 & 60 Vict. c. 36); 1903 (3 Edw. 7, c. 36).

(f) *A.-G. v. Scott* (No. 1) [1904] 1 K. B. 404; *Chichester Corporation v. Foster* [1906] 1 K. B. 167. See further as to the position of a local authority itself in default in such a case, *A.-G. v. Scott* (No. 2) [1905] 2 K. B. 160.

(g) Highway and Locomotives Act, 1878, s. 23; Locomotives Act, 1898, s. 12.

(h) *Savin v. Oswestry* (1880) 44 J. P. 766; *Williams v. Davis*, *ibid.* 347.

(i) *Hill v. Thomas* [1893] 2 Q. B. 333; *Etherley Grange v. Auckland* [1894] 1 Q. B. 41; *Hemsworth v. Micklethwaite* (1904) 2 L. G. R. 1084.

by, or in consequence of whose order (a), such weight or traffic has been conducted, the amount of such expenses caused by the damage arising from such weight and traffic. Claims under 250*l.* can be brought in the county court (b). A limitation of time is imposed for bringing these proceedings (c); and they can only be brought upon the certificate of the road authority's surveyor (d).

*Diversion of Highways.*—By the common law, the course of an antient highway could not be changed, without licence from the Crown, to be obtained after suing out a writ of *ad quod damnum*, and after the finding of an inquisition thereon that the alteration would not be prejudicial to the public (e). But highways may now be stopped up, or diverted, or turned, either entirely or in part, in accordance with the procedure provided by the Highway Act, 1835 (f), as amended by the Local Government Act, 1894. To effect any of these objects, there must first be a resolution of the district council (the borough council in boroughs), and an application by that council to two justices to view the highway. The justices must view the highway together; and, after inspection, may give a certificate that the highway may be diverted, so as to make it nearer or more commodious, or may be stopped up as unnecessary. If the justices certify in favour of a diversion or stopping up, certain notices must be given as required by the Act; and then, after a certain interval of time, the certificate is sent to quarter sessions. An application may then be made for enrolling it in the records of the Court, and for an order for stopping up the highway, wholly or in part, or diverting, as the case

(a) *Epsom U. D. C. v. L. C. C.* [1900] 2 Q. B. 751; *Elgham R. D. C. v. Gordon* [1902] 2 K. B. 120; *Kent C. C. v. Folkestone* [1905] 1 K. B. 620; and, before the 1898 Act was passed, *Kent C. C. v. Gerard* [1897] A. C. 633.

(b) *Chesterfield R. D. C. v. Newton* [1904] 1 K. B. 62;

*Locomotives Act*, 1898, s. 12.

(c) *Norfolk C. C. v. Green* (1904) 2 L. G. R. 652; *Kent C. C. v. Folkestone* [1905] 1 K. B. 620.

(d) *Wirral v. Newell* [1895] 1 Q. B. 827; *Little Hulton v. Jackson* (1904) 2 L. G. R. 986.

(e) 1 Hawk. P. C. ch. 76, s. 3.  
(f) Ss. 84–92.

may be ; and, if there is no opposition and everything is in order, the justices at quarter sessions will make the order asked for (a). They cannot, however, do so unless (in the case of a rural parish) the parish council, or (if there is no parish council) the parish meeting, has given its consent (b) ; and unless (in case of a proposed diversion) the owner of the land through which the new highway is to pass consents (c). But any person aggrieved by the proceeding may appeal from the certificate of the justices to quarter sessions, before the order of that court is made (d) ; and, in the case of such an appeal, the propriety of the stopping up or diversion is to be determined according to the verdict of a jury impanelled to try the question (e).

## B. BRIDGES.

The expense of maintaining bridges is usually defrayed (like that of roads) by the public ; this having been part of the *trinoda necessitas*, to which every man's estate was by the antient law subject, viz., *expeditio contra hostem, arcium constructio, et pontium reparatio*. The burthen of such repair was, however, in general, not on the parish, but on the county at large in which the bridge was situate. "A parish as to highways and a county as to bridges "are on precisely the same footing" (f) ; and, generally speaking, the preceding remarks, as to the common law liability of the parish for highways, apply, *mutatis*

(a) Highway Act, 1835, ss. 84–92 ; Local Government Act, 1894, s. 25. See generally as to the procedure necessary, *R. v. Kent JJ.* [1905] 1 K. B. 378 ; *R. v. Surrey JJ.* [1892] 1 Q. B. 867.

(b) Local Government Act, 1894, ss. 13, 19 (8).

(c) Highway Act, 1835, s. 85.

(d) Act of 1835, s. 88 ; *R. v. Surrey JJ.* (1870) L. R. 5 Q. B. 466.

(e) Act of 1835, s. 89.

(f) *Viner Ab. Bridges* (A). (See *Russell v. Men of Devon* (1788) 2 T. R. 667 ; *R. v. Oxfordshire* (1825) 4 B. & C. 194 ; *A.-G. v. West Riding* (1903) 67 J. P. 173.)

*mutandis*, to a county for bridges. The liability might be rebutted by the county by proof that some person was liable to repair the bridge *ratione tenuræ*, or by proof that by immemorial custom some corporation or the parish, hundred, or borough (a), in which the bridge was situate, had in fact repaired it (b). Broadly speaking, the county is responsible for the repair of all bridges of any magnitude (c), dedicated to and adopted and used by the inhabitants of the county (d). In the case of bridges built, since 1803, by private persons or corporations, the county is not liable to repair them unless they are built in a substantial manner and to the satisfaction of the county surveyor (e).

*Meaning and Extent of Bridges.*—A bridge means a structure of some magnitude (f) erected over water. That it should be erected over a channel for water is essential; although it is immaterial that the channel should sometimes run dry (g). The liability of the county extended, at common law, not only to the bridge itself, but to so much of the road as passed over it and to its ends or approaches; and by the 22 Hen. VIII. (1530) c. 5, the county or other person liable to repair the bridge (h) was made liable to repair three hundred feet either way from the bridge. Such in general is still the law, as to the repair of bridges built prior to the Highway Act, 1835. But by that statute it was provided, that,

(a) See Municipal Corporations Act, 1882, s. 119.

(b) See *R. v. Hendon* (1833) 4 B. & Ad. 628.

(c) See *R. v. Southampton* (1852) 18 Q. B., at p. 853; *R. v. Lancaster* (1868) 32 J. P. 711.

(d) *R. v. Oxfordshire* (1825) 4 B. & C. 194; *R. v. Oxfordshire* (1827) 1 B. & Ad. 297 n.; *R. v. Southampton* (1887) 19 Q. B. D. 590.

(e) Bridges Act, 1803 (43 Geo.

3, c. 59), s. 5. But see power of county to adopt other bridges under section 21 of the Highways and Locomotives Act, 1878, ss. 21, 22.

(f) See *R. v. Southampton* (1852) 18 Q. B., at 853; *R. v. Lancaster* (1868) 32 J. P. 711.

(g) *R. v. Oxfordshire* (1827) 1 B. & Ad. 297 n.; *R. v. Oxfordshire* (1830) 1 B. & Ad. 289.

(h) See *Herts. v. New River* [1904] 2 Ch. 513.



in the case of all bridges *thereafter* to be built, which should be repairable at law by a county, the repair of the road itself passing over the bridge (together with the approaches thereto at either end) should be done by the parish, or other the parties bound to the general repair of the highways; and that the county should remain subject to its former obligation, only as regards “the walls, banks, or fences of the raised causeways, and “raised approaches to any bridge, or the land arches “thereof” (a). The meaning of this section is that “the “stonework and ironwork, etc., of the bridge, and the “earthwork of the raised banks of the approaches other “than the mere surface skin, as well as the walls or “fences thereof, should be maintained by the county; but “that the approaches themselves (in the sense of road- “ways leading to the bridge) and the roadway over it “should be maintained by the authority responsible for “the repair of the contiguous highways” (b).

The repair of bridges repairable by the county is now entrusted to the county council (c).

*Bridges occasioned by cutting through a highway.*—To cut into the surface of a highway without statutory authority is of course indictable as a nuisance. But if a person cut through a highway, even although empowered thereto by statute, there is an obligation upon him at common law to maintain a bridge for all time for the passage of the King’s subjects; and this obligation exists, even where the statute is silent on the subject (d). But where the statute which authorises the cutting into the road obliges the person making the cut to maintain a bridge, the person so bound to maintain the bridge is not also bound to maintain three hundred feet on each side of it under the Statute of Bridges (22 Hen. VIII.

(a) Highway Act, 1835, s. 21. 1888, ss. 3, 11.

(b) *R. v. Southampton* (1886) (d) *Herts. v. New River* [1904]  
17 Q. B. D. 424, *per* Wills, J. 2 Ch. 513.

(c) Local Government Act,  
S.C.—III,

(1530) c. 5). The law as to railway bridges and level crossings is contained in the Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20) (a). The railway companies have to make and maintain for ever any bridge necessitated by the railway, together with the approaches thereto, and all other necessary works in connection therewith.

(a) Ss. 46-52.

## CHAPTER VI.

OF THE LAWS RELATING TO THE SANITARY CONDITION  
OF THE PEOPLE.

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AMONG the earliest enactments relating to the health of the people, may be instanced the statute 1 Jac. I. (1604) c. 31, regarding the plague ; under which statute, it was a capital felony for any person having a plague sore upon him uncured to go abroad and converse in company, after being commanded by the proper authorities to keep his house. But this statute, after being obsolete for many years, was repealed by the Punishment of Offences Act, 1837 (a).

The laws relating to *quarantine* are the next of the sanitary laws of an early date of which mention may properly be made ; ‘ quarantine ’ being the term applied to that period of probation during which vessels arriving from countries infected with certain contagious disorders are placed in restraint by the law. All countries have more or less adopted some law of quarantine : the earliest known quarantine law being an edict of Justinian, of the year 542 A.D. In our own country, the first statute was 9 Anne (1710) c. 2 ; but that statute, with several others subsequently passed for its amendment, was repealed by the Quarantine Act, 1825 (b). This last statute, in its turn, has been repealed by the Public Health Act, 1896 (c), which has extended to the ports and harbours of the realm the provisions relating to “ epidemic, endemic,

(a) 7 Will. 4 & 1 Vict. c. 91,  
s. 4.

(b) 6 Geo. 4, c. 78.  
(c) 59 & 60 Vict. c. 19.

“and infectious diseases,” which are contained in the Public Health Acts hereinafter mentioned; the matter being also further provided for by the Public Health (Ports) Act, 1896 (*a*).

In the year 1832, on the occasion of the outbreak in this kingdom of the Asiatic cholera, the statute 2 & 3 Will. IV. (1832) c. 10, empowered the Privy Council to issue such orders as might appear to it expedient, with a view to the prevention of the spread of the disease, for the relief of persons afflicted thereby, and for the interment of its victims. This Act was continued by the 3 & 4 Will. IV. (1833) c. 75, until the end of the then next session of Parliament, but was not further continued; its continuance having become unnecessary by the disappearance of the epidemic, and by the establishment of those more general provisions for the prevention of disease, of which we shall presently give some account.

The prevention of small-pox has also for a long time been a subject of special legislation. In 1840 and 1841 (*b*), Parliament, adopting the well-established result of Jenner's discoveries, forbade inoculation for small-pox, and provided for the gratuitous vaccination of all who wished for it. In 1853 (*c*), the vaccination of children within three months after birth was first made compulsory under penalties; and vaccination stations for arm-to-arm vaccination were provided. Later statutes (*d*) dealt with the qualifications of the public vaccinators, and the enforcement of the law. In 1867, a consolidating and amending Vaccination Act (*e*) was passed, which for the first time recognised public re-vaccination; and the present law is comprised in it with its amending Acts (*f*), especially the Acts of 1898 and 1907, and the Local Government

(*a*) 59 & 60 Vict. c. 20.

(*e*) 30 & 31 Vict. c. 84.

(*b*) 3 & 4 Vict. c. 29; 4 & 5 Vict. c. 32.

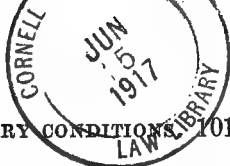
(*f*) 34 & 35 Vict. (1871) c. 98; 37 & 38 Vict. (1874) c. 75; 61 &

(*c*) 16 & 17 Vict. c. 100.

62 Vict. (1898) c. 49; 7 Edw. 7

(*d*) 21 & 22 Vict. (1858) c. 97; (1907) c. 31.

24 & 25 Vict. (1861) c. 59.



Board's Vaccination Orders of 1898, 1910, and 1911, made under those Acts.

Under the present law, the several poor law unions and parishes not in union are divided into districts ; for each of which the guardians have to contract with a duly registered medical practitioner, called the public vaccinator, to vaccinate or re-vaccinate all persons resident in his district. It is his duty to call at the home of every unvaccinated and unexcused child in his district between the ages of four and six months, and offer to vaccinate it with calf lymph under certain prescribed safeguards (a). The production of small-pox by inoculation is punishable with one month's imprisonment (b). It is the duty of the parent, or other person having the custody, of every child, to secure its vaccination, before the age of six months, by the public vaccinator or some other duly qualified medical man ; and if he fails to do so without reasonable excuse he is liable on summary conviction to a penalty of twenty shillings. He is further liable to a similar penalty for neglect to comply with a specific order of a justice for the vaccination of a child within a limited period.

But one of the chief features of the Act of 1898 was that which exempted a parent from liability to these penalties, if, within four months from the birth of the child, he satisfied a police magistrate, or two justices in petty sessions, that he conscientiously believed that vaccination would be prejudicial to the health of his child, and transmitted a certificate of such objection to the vaccination officer. The Act of 1907 now confers exemption from penalties upon a parent who, within the period of four months, makes a statutory declaration of such conscientious belief, and sends the declaration to the vaccination officer (c). The Act of 1898 contains provisions restricting or prohibiting repeated proceedings against a parent in

(a) Act of 1898, s. 1 ; Vacc.  
Order, 1898, sched. 1, 3.

(b) Act of 1867, s. 32.  
(c) Act of 1907, s. 1.

respect of the same child (*a*). But it is incumbent on the guardians to appoint a vaccination officer or officers to enforce the law against parents who have failed to comply with it without legal excuse ; and such officers may institute proceedings without any directions from the guardians, and even contrary to their directions (*b*). The cost of public vaccination and its enforcement is defrayed out of the poor rate ; but public vaccination is not parochial relief, and its acceptance entails no disqualification (*c*).

We now come to consider the more general provisions of the law for the preservation and improvement of the public health. Long before the year 1848, the necessity had been felt in cities and towns of providing for sewerage and drainage, water supply, the prevention of infectious diseases, and the like. And many local Acts were passed giving to the governing bodies of such places powers in connection with such matters. In 1847, an Act called the Towns Improvement Clauses Act (*d*), was passed ; its object being to enable the same clauses to be incorporated by reference in any local or special Act. But, apart from the local or special Act, these clauses had no application. It was not until the year 1848 that the first Public Health Act was passed ; and it may be said that this Act was the beginning of general sanitary legislation in this country.

The Public Health Act, 1848, provided for the establishment of a General Board of Health to superintend and control the execution of the Act. By another statute of the same year (*e*), the General Board was required, on being so ordered by the Privy Council, to issue directions and regulations to prevent or remedy epidemics and contagious diseases. In 1854 (*f*), the Board was re-constituted, and afterwards it was continued from year to year until 1858, when it ceased to exist ; its powers for the prevention

(*a*) Act of 1898, ss. 3, 4.

(*d*) 10 & 11 Vict. c. 34.

(*b*) *Moore v. Keyte* [1902] 1  
K. B. 768.

(*e*) 11 & 12 Vict. c. 123.

(*f*) 17 & 18 Vict. c. 95.

(*c*) Act of 1867, s. 26.

of disease being transferred to the Privy Council. In 1871 (*a*), the Local Government Board was created by statute; and to it were transferred the powers of the Privy Council relating to vaccination and the prevention of disease, together with certain other powers formerly exercised by a Secretary of State in relation to matters affecting the public health, (such as baths and wash-houses, artisans' dwellings, etc.). Many other powers and duties have been conferred or imposed on the Board by later legislation. Some of them, in so far as they relate to sanitary matters, will be noticed further on. But it may be stated generally, that the Local Government Board controls to an important extent the administration of the sanitary laws by local bodies.

It would be unprofitable to enter here into a detailed consideration of the various sanitary Acts which extended and amended the Public Health Act, 1848; for these were all repealed, except in so far as they applied to the metropolis, by the Public Health Act, 1875 (*b*), which consolidated, with amendments, all the earlier statutes. But it may be stated that, by the Public Health Act, 1872 (*c*), the whole of England and Wales was divided into urban sanitary districts and rural sanitary districts; and this division was continued under the Act of 1875. Urban districts comprise municipal boroughs, in which the borough councils are the sanitary authorities, and populous districts formerly governed by local boards or improvement commissioners, now styled urban district councils (*d*). Rural districts are simply the areas of the poor law unions exclusive of any urban district within such areas; and they are governed for sanitary purposes by bodies now styled rural district councils. The constitution and election of these local bodies have been dealt with elsewhere in this volume (*e*).

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| ( <i>a</i> ) Local Government Board Act, 1871 (34 & 35 Vict. c. 70). | ( <i>d</i> ) Local Government Act, 1894, s. 21.     |
| ( <i>b</i> ) 38 & 39 Vict. c. 55.                                    | ( <i>e</i> ) See <i>ante</i> , ch. ii. (pp. 41–45). |
| ( <i>c</i> ) 35 & 36 Vict. c. 79.                                    |   |

The Public Health Act, 1875, and the numerous Acts amending it (a), deal with a great variety of matters ; but in this place we are concerned only with such of them as relate to health. All district councils are charged with the duty of providing sewers for the drainage of their districts. They may lay such sewers under streets, and (on payment of compensation) in private land. They must also provide some means of disposing of the sewage flowing through the sewers ; but they are expressly forbidden to cause or permit such sewage to pollute any river, stream, or lake. It may here be mentioned incidentally, that there are Acts known as the Rivers Pollution Prevention Acts, 1876, 1893, and 1898 (b), which provide machinery for preventing the pollution of streams by sewage or by the effluents from mines or manufactories ; and that the power and duty of enforcing these Acts is imposed on district councils concurrently with county councils (c). The sewers within a district, whether provided by the council or by any other person or body, are, with certain exceptions, vested in the council, whose duty it is to keep them in repair, and generally in such condition as not to be a nuisance. Questions often arise whether a thing is a sewer, in which case the liability is on the council, or a drain, in which case it is on the private individual whose property it is. It may be sufficient here to say, that a drain is that which receives the drainage of one building or of premises within the same curtilage ; while a sewer is any

(a) The following are the " Public Health Acts, 1875 to " 1908 " : 38 & 39 Vict. (1875) c. 55 ; 41 & 42 Vict. (1878) c. 25 ; 42 & 43 Vict. (1879) c. 31 ; 45 & 46 Vict. (1882) c. 23 ; 46 & 47 Vict. (1883) c. 37 ; 47 & 48 Vict. (1883) c. 12 ; 47 & 48 Vict. (1884) c. 74 ; 48 & 49 Vict. (1885) c. 35 ; 48 & 49 Vict. (1885) c. 53 ; 48 & 49 Vict. (1885) c. 72 ; 51 & 52

Vict. (1888) c. 52 ; 53 & 54 Vict. (1890) c. 17 ; 53 & 54 Vict. (1890) c. 59 ; 55 & 56 Vict. (1892) c. 57 ; 59 & 60 Vict. (1896) cc. 19 and 20 ; 7 Edw. 7 (1907) c. 53 ; 8 Edw. 7 (1908) c. 6.

(b) 39 & 40 Vict. c. 75 ; 56 & 57 Vict. c. 31 ; 61 & 62 Vict. c. 34.

(c) Local Government Act, 1888, s. 14.



other kind of drain, and particularly one which receives the drainage of two or more separate houses (a). The district councils are also charged with the duty of seeing that every dwelling-house is provided with drains sufficient for the effectual drainage thereof, and with sufficient sanitary conveniences, such as water-closets, earth-closets or privies, and ashpits; and that such drains and conveniences are kept in proper order and condition. The district councils may themselves provide public conveniences.

District councils have also important powers and duties in connection with the cleansing of streets, the removal and disposal of house refuse, and the cleansing of privies, ashpits, and cesspools.

Following the order adopted in the Public Health Act, 1875, the next of the powers and duties of district councils relates to the provision of a water supply. This can be made by the construction, purchase, or lease of waterworks, and the purchase of necessary water rights, or by contracting with any person or body for a supply of water. The councils cannot, however, construct any waterworks within the limits of supply of any company which has parliamentary powers of supply; so long as that company is able and willing to afford a supply proper and sufficient for public and private purposes. When councils do supply water, they may charge water rates and rents, and act generally in the same way as a company under the Waterworks Clauses Acts, 1847 and 1863 (b), the provisions of which are, for the most part, incorporated into the Public Health Act, 1875. Councils are also empowered and required to see that inhabited dwelling-houses are properly supplied with water; and the owners of such houses may be compelled to provide a supply, either under the Act of 1875, or under the Public Health (Water) Act, 1878 (c), which gave the

(a) *Travis v. Uttley* [1894] 1 & 27 Vict. c. 93.

Q. B. 233.

(c) Act of 1875, s. 62; 41 & 42

(b) 10 & 11 Vict. c. 17; 26 Vict. c. 25.

councils increased powers, especially in rural districts. All public pumps, wells, and works used for the gratuitous supply of water to the inhabitants of a district, are vested in the council of that district; and the councils have power to close polluted wells, whether public or private.

It is only possible in the space at command to mention that district councils have important powers and duties with reference to the occupation of cellar dwellings, the registration and inspection of common lodging-houses, and the regulation by means of by-laws of houses (other than common lodging-houses) let in lodgings. But the subject of nuisances requires more attention.

The Act of 1875 (a) enumerates certain things which are described as nuisances liable to be dealt with summarily. These include premises in such a state as to be a nuisance or injurious to health: any pool, ditch, privy, cesspool, drain, ashpit, etc., in a similar state; any animal kept so as to be, and any accumulation or deposit which is, a nuisance or injurious to health; any house which is overcrowded; any factory not kept clean or properly ventilated, or overcrowded; any furnace which does not consume its own smoke; and any chimney (not being a chimney of a private dwelling-house) which gives off black smoke in such quantity as to be a nuisance (b). Councils are required, on being informed of any of these nuisances, to serve a notice on the person causing them, or, if he cannot be found, on the owner or occupier of the premises where they exist, requiring him to abate the nuisance. If he fails to do so, he may be summoned before the justices, who may make an order upon him to abate the nuisance or to prevent its recurrence; and if he does not obey the order he is liable to penalties. If it is thought that the summary remedy is insufficient, a council may bring an action for an injunction in the High Court; but

(a) S. 91.

1907; which is, however, an

(b) This list of nuisances has been extended by the Act of 'adoptive' Act.

in that case the courts have held that the action must be in the name of the Attorney-General (a). Penalties are imposed on persons who newly establish certain offensive trades in urban districts ; and powers are conferred on urban councils to restrain the carrying on of trades which cause effluvia.

The provisions of the Act of 1875 relating to unsound meat are now, by the Public Health Acts Amendment Act, 1890 (b), extended to all articles of food. These provisions enable the medical officer of health or inspector of nuisances to enter any premises, and inspect anything exposed for sale or deposited for the purpose of sale or preparation for sale, and intended for human food. If the article appear on inspection to be unsound or unwholesome, he may seize it and convey it before a justice to be condemned ; and the person to whom it belonged, or on whose premises it was found, is liable to penalties. In this connection, reference may be made to the Public Health (Regulations as to Food) Act, 1907 (c).

The provisions of the Public Health Act, 1875, relating to infectious diseases, have been greatly extended and amended by later Acts—the Epidemic and Other Diseases Prevention Act, 1883 (d); the Public Health (Ships) Act, 1885 (e), the Infectious Diseases (Prevention) Act, 1890 (f), the Public Health (Ports) Act, 1896 (g), and the Public Health Act, 1907 (h). Another important Act is the Infectious Diseases (Notification) Act, 1889 (i), originally an ' adoptive ' Act, but now made compulsory by the Infectious Disease (Notification) Extension Act, 1899 (k). It requires the head of the family to which belongs any person suffering from a dangerous infectious disease, and

(a) *Wallasey Local Board v. Gracey* (1887) 36 Ch. D. 593 ;  
*Tottenham Urban District Council v. Williamson* [1896] 2 Q. B. 353.

(b) 53 & 54 Vict. c. 59, s. 28.

(c) 7 Edw. 7, c. 32.

(d) 46 & 47 Vict. c. 59.

(e) 48 & 49 Vict. c. 35.

(f) 53 & 54 Vict. c. 34.

(g) 59 & 60 Vict. c. 20.

(h) 7 Edw. 7, c. 53.

(i) 52 & 53 Vict. c. 72.

(k) 62 & 63 Vict. c. 8.

every medical practitioner attending such person, to notify the fact to the medical officer of health for the district. The medical practitioner receives a fee for each notification. The diseases to which the Act applies include small-pox, cholera, diphtheria, membranous croup, erysipelas, scarlet fever, typhus, typhoid, enteric, relapsing, continued, or puerperal fever, and any other diseases to which the Act may be extended by order of the district council, with the approval of the Local Government Board. General Orders have been made by the Board for the notification of pulmonary tuberculosis, cerebro-spinal fever, and acute poliomyelitis (*a*).

The information thus obtained enables a district council to a large extent to check the spread of disease by means of the exercise of its general powers, of which only a few can here be mentioned. The council may require a house to be properly disinfected. It may provide a suitable place and apparatus for the disinfection of clothes, bedding, etc., and may require such clothing or bedding to be brought for disinfection, or destroyed when necessary. To it are entrusted the duties of enforcing the provisions of the Rag Flock Act, 1911 (*b*), the object of which is to prevent the sale and use for manufacturing purposes of unclean flock made from rags. It can provide ambulances, and may procure a justices' order for the removal to a hospital of any person suffering from infectious disease who has no proper lodging or accommodation (*c*), or who is on board any ship or vessel, or is in a canal boat (*d*). It may prevent the removal of a dead body from a hospital or mortuary, except for burial; and require the burial of dead bodies remaining unburied in rooms occupied by living persons. And it may provide temporary shelter for persons who have been compelled to leave a house in order that it may be disinfected. The district council

(*a*) S. R. & O., 1912, pp. 1116–1121. 1911, made thereunder.  
 (*c*) *Warwick v. Graham* [1899]  
 (*b*) 1 & 2 Geo. 5, c. 52. And 2 Q. B. 191.  
 see the Rag Flock Regulations, (*d*) Canal Boats Act, 1877, s. 4.

may cause dairies to be inspected, with a view to preventing the spread of disease by means of milk. And it can enforce various sections of the statutes which forbid such acts as the exposing of infected persons in streets and public places ; the selling or exposure of infected clothing, rags, or other articles ; the use of public conveyances by infected persons without notice, and the subsequent use of such vehicles without disinfection ; the letting of houses or apartments which have been infected before they have been properly disinfected ; the throwing of infectious rubbish into ashpits, etc. Many of these provisions are applied to ships by the Public Health (Ships) Acts, 1885 (a). Under the Diseases of Animals Acts, 1894–1911, district councils have important powers for the registration, inspection, and regulation of dairies, cowsheds, and milkshops.

District councils have power to provide hospital accommodation for sick persons in their district ; and they may do so by entering into contracts for the use of a hospital, or the reception of patients into a hospital, or by the building of a hospital. But, in the case last mentioned, they must not build or use the hospital so as to be an avoidable nuisance (b). District councils may also provide mortuaries, and cemeteries under the Public Health (Interments) Act, 1879 (c).

Elsewhere in this work it has been stated (d), that both in urban and rural districts the councils act as surveyors of highways. Their powers and duties in this respect as such are only remotely connected with the sanitary condition of the people, and may be passed by with this mere mention. But urban councils have powers and duties connected with streets which bear more directly on the subject of this chapter. First among these is the power of making up, that is to say, sewerage, levelling,

(a) 48 & 49 Vict. c. 35.

(b) *Metropolitan Asylum District v. Hill* (1881) L. R. 6 App.

Ca. 193.

(c) 42 & 43 Vict. c. 31.

(d) See *ante*, p. 88.

paving, channelling, and lighting such streets as are not highways repairable by the inhabitants at large. Such streets are of two kinds: (1) those which have never been dedicated to public use (*a*), and (2) those streets which have been dedicated to public use as highways since 1835, but have never become repairable by the highway authority by reason of non-compliance with the Highway Act, 1835 (*b*). Under the Public Health Act, 1875 (*c*), notice has to be given to the persons whose property abuts on the street, to do the necessary works; in their default, the council executes the works and recovers the expenses from the owners in proportion to their respective frontages. An alternative procedure is provided by the Private Street Works Act, 1892 (*d*); the principal feature of which is, that, while the owners have not the option of themselves doing the work, they are enabled to raise before justices various objections to the works, which previously could only have been raised after the works were executed and proceedings had been taken to recover the expenses. Once the works have been done, the district council may declare the street to be a highway repairable by the inhabitants at large.

An urban council has power to make new streets and widen old ones; and it can prevent the erection or bringing forward of buildings beyond the houses on either side (*e*). But perhaps its most important power is that which enables it to make and enforce by-laws with respect to new streets and buildings. These may relate to the level, width, construction, and sewerage of new streets, and to such matters as the structure of the walls,

(*a*) *Taylor v. The Corporation of Oldham* (1876) 4 Ch. D. 395, 407, *per* Jessel, M.R.

(*b*) 5 & 6 Will. 4, c. 50, s. 23; *Roberts v. Hunt* (1850) 15 Q. B. 17; *R. v. Wilson* (1852) 18 Q. B. 348; *R. v. Dukinfield* (1863) 32 L. J. M. C. 230; *Eyre v. New Forest Highway Board* (1892) 56

J. P. 517; *Rishton v. Haslingden Corporation* [1898] 1 Q. B. 294; *Leigh Urban District Council v. King* [1901] 1 K. B. 747.

(*c*) S. 150.

(*d*) 55 & 56 Vict. c. 57.

(*e*) See the Public Health (Buildings in Streets) Act, 1888 (51 & 52 Vict. c. 52).

foundations, roofs, and chimneys of new buildings, and the provision of proper air space and ventilation, means of drainage, sanitary conveniences, etc. By-laws may also be made for the closing of premises unfit for human habitation.

Urban councils may also acquire or accept gifts of land for public parks or recreation grounds, and make regulations for their use ; and they may, subject, however, in this case, to private rights, establish and regulate markets, and provide public slaughter-houses. Private slaughter-houses have to be registered, if they were in existence before the district became urban ; those established afterwards have to be licensed every year.

Reference has already been made to by-laws for certain purposes. It may be convenient to say, that they may be made for a great variety of other purposes, such as the cleansing of footways, and of closets, cesspools, ashpits, etc., the removal of house refuse, the prevention of nuisances from snow, filth, dust, ashes, and rubbish, the keeping of animals, the regulation of common and other lodging-houses, the conduct of offensive trades, the management of mortuaries, public pleasure grounds, and markets, the accommodation of persons engaged in hop-picking or fruit-picking (*a*), the regulation of public sanitary conveniences, the removal of offensive matter through the streets, etc. No such by-laws are valid unless confirmed by the Local Government Board ; but such confirmation of itself gives them no validity. They may be invalid, though duly confirmed, if they are uncertain, unreasonable, or repugnant to the general law.

It may be observed that, while many of the powers and duties above mentioned belong to urban councils only, the Local Government Board has power to confer on a rural council all or any of such powers, by means of a simple Order published in the prescribed manner.

(*a*) Public Health (Fruit-Pickers' Lodgings) Act, 1882.

The foregoing outline, necessarily an imperfect one, of the powers and duties of district councils, has been thus far confined to such as arise under the Public Health Acts. There are, however, various other statutes under which these councils exercise functions which relate to the sanitary condition of the people. Prominent among these are the Acts relating to the Housing of the Working Classes, 1890 to 1909 (*a*). The first of these Acts is the principal Act; and it is divided into three parts. It has been amended to a considerable extent, more especially by the Act of 1909. Under the first part, provision is made for the clearing of unhealthy areas. This is effected by means of an improvement scheme which has to be embodied in a Provisional Order and confirmed by Parliament. The second part relates to unhealthy dwelling-houses. Every local authority is required to cause to be made, from time to time, inspection of its district, with a view to ascertain whether any dwelling-house is in a state so dangerous or injurious to health as to be unfit for human habitation; and machinery is provided whereby such dwelling-houses can be closed or demolished if they are unfit for human habitation. The Local Government Board has power, by the Act of 1909 (*b*), to act independently of the local authority, if complaint is made to it by certain bodies or persons. Under the third part, district councils may provide and control lodging-houses for the working classes; and in the expression 'lodging-houses' are included separate houses or cottages with or without gardens not exceeding half an acre. The lodging-houses may be within or without the district of the council which provides them.

The Act of 1909 (*c*) contains provisions as to town-planning, a subject distinct from that of housing. Local authorities are allowed, subject to regulations by the

(*a*) 53 & 54 Vict. (1890) c. 70; (1909) c. 44.  
 63 & 64 Vict. (1900) c. 59; 3 (*b*) 9 Edw. 7, c. 44, s. 10.  
 Edw. 7 (1903) c. 39; 9 Edw. 7 (*c*) Part II.



Local Government Board, to make town-planning schemes with respect to any land which is in the course of development, or which appears likely to be used for building purposes. This enables the local authority to provide in advance for the proper sanitation and amenities of land which, from any cause, is being developed for building.

Among other statutes affecting public health which are administered by district councils, may be enumerated the following :—the Knackers Acts, 1786 and 1844 (*a*), and the Protection of Animals Acts, 1911 and 1912 (*b*), the Baths and Washhouses Acts, 1846 to 1882 (*c*), the Public Improvements Act, 1860 (*d*), the Agricultural Gangs Act, 1867 (*e*), the Acts for the prevention of the adulteration of food, commonly called the Sale of Food and Drugs Acts, 1875 to 1907 (*f*), the Commons Acts, 1876 and 1899 (*g*), the Canal Boats Acts, 1877 and 1884 (*h*), the Alkali, etc., Works Regulation Act, 1906 (*i*), the Margarine Act, 1887, and the Butter and Margarine Act, 1907 (*k*), the Open Spaces Act, 1906 (*l*), the Allotments Act, 1908 (*m*), the Sale of Horseflesh Regulation Act, 1889 (*n*), the Museums and Gymnasiums Act, 1891 (*o*), the Shops Acts, 1912 to 1913 (*p*), the Isolation Hospitals Acts, 1893 and 1901 (*q*), the Factory and Workshop Acts 1901 to 1911 (*r*), and the Poisons and Pharmacy Act, 1908 (*s*).

(*a*) 26 Geo. 3, c. 71; 7 & 8 Vict. c. 87.

(*b*) 1 & 2 Geo. 5, c. 27; 2 & 3 Geo. 5, c. 17.

(*c*) 9 & 10 Vict. (1846) c. 74; 10 & 11 Vict. (1847) c. 61; 41 & 42 Vict. (1878) c. 14; 45 & 46 Vict. (1882) c. 30.

(*d*) 23 & 24 Vict. c. 30.

(*e*) 30 & 31 Vict. c. 130.

(*f*) 38 & 39 Vict. c. 63; 42 & 43 Vict. c. 30; 62 & 63 Vict. c. 51; 7 Edw. 7, c. 21.

(*g*) 39 & 40 Vict. c. 56; 62 & 63 Vict. c. 30.

(*h*) 40 & 41 Vict. c. 60; 47 & 48 Vict. c. 75.

(*i*) 6 Edw. 7, c. 14.

(*k*) 50 & 51 Vict. c. 29; 7 Edw. 7, c. 22.

(*l*) 7 Edw. 7, c. 25.

(*m*) 8 Edw. 7, c. 36.

(*n*) 52 & 53 Vict. c. 11.

(*o*) 54 & 55 Vict. c. 22.

(*p*) 2 & 3 Geo. 5, cc. 3 and 24.

(*q*) 56 & 57 Vict. c. 68; 1 Edw. 7, c. 8.

(*r*) 1 Edw. 7, c. 22; 7 Edw. 7, c. 39; 1 & 2 Geo. 5, c. 21.

(*s*) 8 Edw. 7, c. 55.

It is necessary to mention specially the Burial Acts. The first of these, the Act of 1852 (*a*), applied only to the metropolis. It provided for the closing of old burial grounds and churchyards, and the provision and management of new burial grounds by burial boards elected for the purpose in each parish by the inhabitants in vestry. The provisions of the Act were extended to the rest of the country by an Act of 1853 (*b*); and it has been amended by many subsequent statutes (*c*). The burial boards by which these Acts were administered have now been largely superseded, and their powers and duties transferred, under the Local Government Act, 1894 (*d*), to the district and parish councils. Such powers and duties, however, must not be confounded with those which district councils, as such, possess under the Public Health (Interments) Act, 1879, already mentioned. In this connection may be mentioned the Cremation Act, 1902 (*e*); under which burial authorities have power to provide and regulate crematoria for the burning of human remains.

There remain still to be mentioned the sanitary Acts in force in the metropolis. These are the Metropolis Management Acts, 1855–1899 (*f*). They relate, of course, to the local government of the metropolis generally, and not only to sanitary matters; but it was under the earlier of them that the main drainage of London was carried out. In addition to these Acts, and

(*a*) 15 & 16 Vict. c. 85.

(*b*) 16 & 17 Vict. c. 134.

(*c*) 17 & 18 Vict. (1854) c. 87; 18 & 19 Vict. (1855) c. 128; 20 & 21 Vict. (1857) cc. 35, 81; 22 Vict. (1859) c. 1; 23 & 24 Vict. (1860) c. 64; 25 & 26 Vict. (1862) c. 100; 34 & 35 Vict. (1871) c. 33; 43 & 44 Vict. (1880) c. 41; 44 & 45 Vict. (1881) c. 2; 48 & 49 Vict. (1885) c. 21; 63 & 64 Vict. (1900) c. 15; 6 Edw. 7 (1906) c. 44.

(*d*) 56 & 57 Vict. c. 73.

(*e*) 2 Edw. 7, c. 8.

(*f*) 18 & 19 Vict. (1855) c. 120; 19 & 20 Vict. (1856) c. 112; 21 & 22 Vict. (1858) c. 104; 25 & 26 Vict. (1862) c. 102; 41 & 42 Vict. (1878) c. 32; 48 & 49 Vict. (1885) c. 33; 50 & 51 Vict. (1887) c. 17; 53 & 54 Vict. (1890) cc. 54, 66; 56 & 57 Vict. (1893) c. 55; 62 & 63 Vict. (1899) c. 15.

more especially dealing with sanitary matters, is the Public Health (London) Act, 1891 (*a*), which consolidated for the metropolis all the earlier legislation in the same way, and very much on the same lines, as was done by the Public Health Act, 1875, for the rest of the country. It has been amended by the Public Health (London) Acts, 1893 and 1896 (*b*), and by the London County Council (General Powers) Acts, 1893 to 1910 (*c*).

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|--|----------------------------------|
| ( <i>a</i> ) 54 & 55 Vict. c. 76.        | Edw. 7, c. ccxiv. ; 7 Edw. 7, c. |
| ( <i>b</i> ) 56 & 57 Vict. c. 47 ; 59 &  | clxxv. ; 8 Edw. 7, c. cvii. ; 9  |
| 60 Vict. c. 19.                          | Edw. 7, c. cxxx. ; and 10 Edw.   |
| ( <i>c</i> ) 56 & 57 Vict. c. ccxxi. ; 4 | 7, and 1 Geo. 5, c. cxxix.       |

## CHAPTER VII.

## OF THE LAWS RELATING TO THE POOR.

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[By the common law, as appears from the *Mirroure* (a), the poor were to be “sustained by parsons (rectors of the “church) and the parishioners, so that none of them “should die for default of sustenance”; but no compulsory method for their relief or sustenance was provided until the reign of Henry the Eighth. The monasteries undoubtedly supported a very numerous and idle poor, by a daily distribution of alms at their gates; and upon their dissolution, divers statutes were made, in the reigns of King Henry the Eighth and his children, for providing for the poor and impotent, who, as the preambles to some of them recite, had of late years increased.

These poor were principally of two sorts: the sick and impotent, and therefore unable to work; the idle and sturdy, who, although able, were not willing to work. To provide, in some measure, for both of these, in and about the metropolis, Edward the Sixth founded three royal hospitals: Christ’s and St. Thomas’ for the relief of the impotent, and Bridewell for the punishment and employment of the vigorous and idle. Ultimately, after many other experiments more or less effective, by the Poor Relief Act, 1601 (which is generally considered as the foundation of the modern Poor Law), *overseers* of the poor were appointed in every parish;] and it was provided, that the churchwardens of every parish should be the overseers, and that there should likewise be appointed as overseers two, three, or four, but not more, of the

inhabitants, being substantial householders, to be nominated yearly by two justices dwelling in or near the parish.

This Act of Elizabeth involved two principles : first, that every poor person should be either relieved, or provided with work, and, second, that this should be done *parochially*, that is, out of funds to be raised and applied by parish officers within the limits of their respective parishes. It is to be understood, however, that it was not the policy of the law, to allow paupers to resort for relief indiscriminately to any parish they might prefer ; for, by certain statutes of a date anterior to the Act of Elizabeth, persons unable or unwilling to work were compellable to remain in the particular parishes where they were *settled* (a). This parochial principle has been maintained ; and the way in which persons become settled in a parish is explained later. So also, the principle of each parish raising the funds from occupiers of property within the parish is still adopted, and is very strikingly illustrated by the way in which railways, tramways and other undertakings stretching into several parishes, are rated separately in every parish in respect of the property occupied in each parish by the undertaking (b).

It is important to notice the attempts that have from time to time been made by the legislature to improve the administration of poor relief. By the 22 Geo. III. (1782) c. 88, commonly called Gilbert's Act (c), any parish was authorised, by consent of two third parts in number and value of the owners or occupiers, and with the approbation of two justices, to appoint *guardians* to act in lieu of overseers, in all matters relative to the relief and management of the poor, and also to enter into a voluntary union with one or more other parishes, for

(a) 19 Hen. 7 (1503) c. 12 ; 1 Edw. 6 (1547) c. 3 ; 3 & 4 Edw. 6 (1550) c. 16 ; 14 Eliz. (1572) c. 5.

(b) See *R. v. L. B. & S. C. Co.* (1851) 15 Q. B. 313.

(c) Repealed by the Statute Law Revision Act, 1871.

the more convenient accommodation, maintenance, and employment of their paupers in common; and by the Poor Relief Act, 1819, any parish, in vestry assembled, was enabled to commit the management of its poor to a committee of the parishioners called a *select vestry*, to whose orders the overseers were to conform (a). But these measures, though pointing in the right direction, were not effective; nor, indeed, were they generally adopted. During, and after, the Napoleonic wars, pauperism continued to increase; and its evils were aggravated by mal-administration of the Poor Laws, and by the inherent defects of Poor Law organisation. The size of most parishes was so limited as to expose them to great disadvantages, both with regard to the employment and to the relief of their poor; the difficulty and expense of which may both obviously be reduced, when the field of operation is wider, and provision can be made on a larger scale. These considerations induced Parliament, in the year 1833, to urge a royal commission, to inquire into and report on the laws relating to the poor; and in the following year, and upon the basis of the report of the commissioners, was passed the Poor Law Amendment Act, 1834, which, amended and supplemented by a number of statutes, is still the foundation of the existing system of poor law relief. A new principle of poor relief has been attempted by the Unemployed Workmen Act, 1905, under which provision may be made for relieving poverty throughout the country, and others by the Old Age Pensions Acts, 1908 and 1911, and the Labour Exchanges Act, 1909. But the provisions of those Acts can barely be touched upon in this chapter.

By the Act of 1834, the general management of the poor, and of the funds for their relief, throughout the country, was placed for a limited period under the

(a) The Poor Relief Act, 1819, the concerns of the poor, was so far as it empowered parishes repealed by the Statute Law to establish select vestries for Revision Act, 1873.

superintendence and control of a body of Poor Law Commissioners ; who had power to make regulations for the guidance of the different parochial authorities in carrying out the poor law statutes. The Commissioners were aided in their operations by a certain number of assistant commissioners. This Commission was superseded in the year 1847 ; and all its powers and duties were transferred to the Poor Law Board (a). In 1871 this Board again was replaced by the Local Government Board (b), which consists of a President (a responsible Minister of the Crown, holding office during pleasure (c)), together with (as *ex-officio* members) the Lord President of the Privy Council, all the Secretaries of State, the Lord Privy Seal, and the Chancellor of the Exchequer. In practice the powers of the Board are exercised by the President and the permanent secretaries. All general poor law rules—a term which extends to all rules intended to affect more than one union (d)—must be under the seal of this Board, and signed by the President or one of the *ex-officio* members of the Board, and countersigned by a secretary or assistant-secretary ; and any such rules may be disallowed by His Majesty in Council (e), or their validity may be questioned in the King's Bench Division (f). Once in every year the Board submits to Parliament a general report of its proceedings (g).

The Poor Law Commissioners were originally empowered to order, that parishes should be united into unions, and that the relief of the poor in any union or single parish should be administered by a board of guardians, to be elected by the owners of property and ratepayers in that parish (h). The system of election, however, has been

(a) Poor Law Board Act, 1847, s. 10 ; Poor Law Amendment Act, 1867.

(b) See the Local Government Board Act, 1871.

(c) Only the president and one of the Board's secretaries may sit in the House of Commons at

the same time (s. 4).

(d) Act of 1847, s. 15.

(e) *Ibid.* s. 17.

(f) Act of 1834, s. 105 ; Act of 1849, s. 13 ; *R. v. Oldham Union* (1847) 10 Q. B. 700.

(g) Act of 1847, s. 13.

(h) Act of 1834, ss. 26, 38, 39,

assimilated by the Local Government Act of 1894 to that of more democratic bodies. In rural districts the persons elected as district councillors are also guardians of the poor (*a*); in urban districts guardians are still separately elected by the parochial electors (*b*). The county justices resident in the union or parish were at first made *ex-officio* guardians; and so continued until 1894, when all *ex-officio* guardians were abolished by the Local Government Act of that year. Poor Law inspectors were appointed by another Act, for the purpose of visiting workhouses, and of being present at meetings of guardians, or other local meetings held for the relief of the poor (*c*); and the superintendence of the Poor Law Board was extended to poor persons lodged and maintained by contract, in any establishment not being a lunatic asylum or workhouse, nor under the effective control of any parochial or other local authority (*d*). Moreover, no parishes were for the future to be united, under Gilbert's Act, without the previous consent of the Board; but the Board might at its discretion consolidate two or more parishes into one *union*, under the government of a single board of guardians, to be elected by the owners and ratepayers of the component parishes (*e*). Each of such unions was to have a common workhouse, provided and maintained at the common expense of the component parishes; and also a *common fund*, to which each component parish was to contribute (*f*). On this fund was charged (by the Union Chargeability Act, 1865) all the cost of the relief of the union poor, as well as certain other expenses incurred by the union board of guardians (*g*);

40. For the reformed system, see Local Government Act, 1894 (56 & 57 Vict. c. 73).

(*a*) See *ante*, p. 42.

(*b*) Local Government Act, 1894, ss. 20, 43, 48, 60.

(*c*) Act of 1847, ss. 18, 20.

(*d*) Act of 1849, ss. 1, 7.

(*e*) Act of 1834, s. 38.

(*f*) Poor Removal Act, 1861, ss. 9-11; Act of 1865, s. 12; Act of 1867, s. 15.

(*g*) The other expenses referred to comprise the relief of destitute wayfarers (Poor Law Amendment Act, 1848, s. 10; 1849, s. 2; Poor Removal Act, 1861, s. 4); the burial of



and by the Poor Law Act, 1879, provision was made for the combination of unions in certain cases (a). As regards the relief of the destitute poor *in the metropolis*, the cost thereof is distributed among the several unions, parishes, and places therein, under the superintendence of the Local Government Board (b).

The provisions above summarised are (roughly speaking) the provisions now in force. The Poor Law system, as at present established, is in great need of consolidation, being contained in over two hundred Acts of Parliament. It will be most conveniently dealt with, if we consider it, first, in connection with the settlement of the poor; and, second, in connection with the administration of poor law relief, and the assessment and collection of the poor rate.

**I. Poor Law Settlements.**—A settlement may be acquired by birth, or by parentage, or by marriage, or by renting a tenement, or by being bound apprentice and inhabiting, or by estate, or by payment of taxes, or by residence. (1.) By *birth*; for wherever a child is first known to be, that is always *prima facie*, and until some other can be shown, the place of its settlement (c). But if its parents can be proved to have acquired a settlement, either by birth or otherwise, in another parish, then the *prima facie* settlement of the child will be superseded by a derivative one, viz., the settlement by parentage (d).

workhouse paupers (Poor Law Amendment Act, 1850; Union Chargeability Act, 1865, s. 1); the relief of persons temporarily disabled by accident or sickness (Act of 1848, s. 2); the costs of pauper lunatics (Lunacy Act, 1890, s. 286); and vaccination and registration expenses (Union Chargeability Act, 1865, s. 1).

(a) S. 8. On one occasion of great distress in the counties of Lancaster, Chester, and Derby,

the poor law authorities were, by a temporary Act (25 & 26 Vict. (1862) c. 110), enabled to call on the unions of the county at large to contribute to the relief required in particular unions.

(b) Metropolitan Poor Act, 1867, c. 6; Local Government Board Act, 1871. And see *R. v. Mowatt* (1905) 93 L. T. 789.

(c) *R. v. All Saints, Derby* (1849) 14 Q. B. 219.

(d) *Edmonton Union v. St.*

(2.) By *parentage*; for a legitimate child takes the last settlement of its father, or of its widowed mother (as the case may be), till it attains the age of sixteen, and retains such settlement until it acquires another; and a bastard child now retains the settlement of his mother until he gains another for himself (a). (3.) By *marriage*; for a female may claim the settlement which belongs to her husband; and she retains that settlement after his death (b). But if her husband has no settlement, or if his settlement is unknown, she retains that which belonged to her before her own marriage; and she cannot acquire one, in her own right, during the marriage (c). (4.) By *renting a tenement*; and for this it is requisite, that the tenement shall be a separate and distinct tenement, and that the party shall have *bond fide* rented the same, at and for the sum of ten pounds a year at the least, for the term of one whole year. He must also have occupied the tenement and paid the rent for the term of one whole year at the least, and must (for the same period) have been assessed to and have paid the poor rate in respect thereof, and must have resided in the parish or township for forty days (d). (5.) By being *bound apprentice*, and *inhabiting* for forty days under such binding, the apprentice gains a settlement in the parish in which he inhabits, which need not necessarily be the parish in which the service takes place (e); but no settlement can be acquired by being apprenticed to the sea service, or to a householder exercising the trade of the

*Mary, Islington* (1885) 15 Q. B. D. 95; *Reigate Union v. Croydon Union* (1889) L. R. 14 App. Ca. 465.

(a) Divided Parishes Act, 1876, s. 35; *R. v. Bridgnorth* (1882-3) 9 Q. B. D. 765; 11 Q. B. D. 314; *West Ham v. Holbeach* [1905] A. C. 452; *Woolwich v. Fulham* [1905] 2 K. B. 203.

(b) Act of 1876, s. 35.

(c) *Medway Union v. Westminster Union* (1889) L. R. 14 App. Ca. 465; *Tewkesbury v. Birmingham* [1904] 2 K. B. 395.

(d) Poor Relief (Settlement) Act, 1825, s. 2; 1831, s. 1; Poor Law Amendment Act, 1834, s. 66.

(e) *Rex v. Brotton* (1820) 4 B. & Ald. 84.

seas, as a fisherman or otherwise (a). And the indenture of apprenticeship must, to be effective in determining a settlement, in all cases have been executed by the apprentice, except in the case of one bound by the parish (b). (6.) By *estate*; for a settlement is gained, of a temporary kind, in any parish, by having an estate of one's own there, of whatever value, and whether the interest be legal or equitable (c), combined with a residence in the parish for forty days—a species of settlement which appears to be founded on the principle of the common law, that a man shall not be removed from his own property (d). But no person may retain a settlement so gained for any longer time than he inhabits within ten miles of the parish (e); and in case he ceases to inhabit within that distance, and afterwards becomes chargeable, he is liable to be removed to the parish in which he was settled previously to such inhabitancy, or else to the parish (if any) in which he has gained a settlement since the inhabitancy (f). (7.) By *payment of parochial taxes*; for a settlement may be gained by being charged to and paying the public taxes, and levies of the parish (g), provided the tenement assessed is of the yearly value of ten pounds, and (not being the person's own property) is a separate and distinct tenement *bond fide* rented by him for ten pounds a year at the least, for the term of one whole year, and occupied for a year at least (h). Last and most important of all, a settlement is acquired (8.) by

(a) Act of 1834, s. 67.

Q. B. 446; *R. v. Hendon* (1842)

(b) *Ibid.* s. 15; Act of 1844, s. 12; Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60) ss. 106, 107.

2 Q. B. 455.

(c) *R. v. Ardleigh* (1837) 7 A. & E. 70.

(g) Poor Relief Act, 1691, s. 6; Poor Relief (Settlement) Act, 1825, s. 2; 1831, s. 1; Act of 1834, s. 66; *St. George's, Hanover Square v. Cambridge Union* (1867) L. R. 3 Q. B. 1.

(d) *Ryslip v. Harrow* (1699) 2 Salk. 524.

(e) *R. v. Saffron Walden* (1846) 9 Q. B. 76.

(h) Poor Removal Act, 1795, s. 4; Poor Relief (Settlement) Act, 1825, s. 2; *St. George's, Hanover Square v. Cambridge Union*, *ubi sup.*

(f) Act of 1834, s. 68; *R. v. St. Giles-in-the-Fields* (1842) 2

*residence*; for a settlement may also be acquired by residing for the term of three years in a parish in such manner and under such circumstances in each of such years as would render the resident irremovable (a). A settlement so acquired is to be distinguished from the *status of irremovability*, upon which we shall speak later.

When, by any of the modes above enumerated, a person has gained a settlement in any parish, he is considered as settled there until he acquires a new one in some other place; but a later acquisition supersedes an earlier. And all those who stand in need of relief, and apply for it, are entitled to be relieved, at least temporarily, in the parish or union in which they happen to be, or to which, as it is commonly expressed, they are *chargeable*; for if settled there, they constitute its *settled* poor, and if not settled there, they are termed its *casual* poor (b). The parish is, however, exonerated from this burthen, if there is any one competent and by law compellable to maintain the pauper; and those who are so compellable comprise the wife and husband, the father and grandfather, the mother and grandmother, and the legitimate (c) children of the pauper (d); a husband being also liable by the Poor Law Amendment Act, 1834 (e), to maintain his wife's children born before his marriage with her, until the children attain sixteen years of age, or their mother dies sooner. The measure or extent of this liability is prescribed by an order of the justices at their general quarter or petty sessions (f); and on refusal to obey such order, the sums so assessed are recoverable before a court of

(a) Divided Parishes Act, 1876, s. 34; *St. Olave's Union v. Canterbury Union* [1897] 1 Q. B. 682; *Hackney Union v. Kingston-upon-Hull Incorporation for the Poor* [1912] A. C. 475; *Tewkesbury v. Upton* [1913] 3 K. B. 475.

(b) *R. v. St. Pancras* (1838) 7 A. & E., at p. 754.

(c) *City of Westminster v. Gerrard* (1631) 2 Bulst. 346.

(d) Poor Relief Act, 1601, s. 7; Poor Law Amendment Act, 1867, ss. 33, 36; Married Women's Property Acts, 1870, s. 13; 1882, s. 21; 1908, s. 1.

(e) Ss. 56, 57.

(f) Poor Relief Act, 1819, s. 26.

summary jurisdiction as a civil debt, *i.e.*, they may be levied by distress and sale of the goods and chattels of the person liable. And in default of distress, if it be proved that such person has had means to pay since the order, and has not paid, he may be committed to prison for contempt (a).

As a further safeguard, it is provided by the Poor Relief Act, 1718, that where any person shall run away from his place of abode, leaving his wife or children chargeable as paupers, his goods, and any annual profits of his lands, may be seized under the warrant or order of two justices, and (if such warrant or order be confirmed by the sessions) may be applied towards the maintenance of such wife or children; and it is further provided, by the Vagrancy Act, 1824 (b), that persons running away (c) and leaving their wives or children so chargeable, shall be deemed 'rogues and vagabonds,' and shall be liable to imprisonment for any time not exceeding three calendar months. By the same Act, persons wholly or in part able to maintain themselves or families by work or other means, but wilfully refusing or neglecting so to do (d), whereby they become so chargeable, shall be deemed 'idle and disorderly persons,' and may be summarily convicted, and imprisoned in a house of correction with hard labour, for any time not exceeding one calendar month (e).

If there are no relatives to whom recourse can be had, the 'settled poor' must be relieved by the poor law authorities of their union or parish, so long as their necessity continues; but if they are able to work and refuse to do so, they may be committed to prison (f).

(a) Act of 1868, s. 36; Summary Jurisdiction Act, 1879, ss. 6, 35.

(b) S. 4.

(c) *Bannister v. Sullivan* (1904) 2 L. G. R. 874; 91 L. T. 380.

(d) S. 3; *Poplar v. Martin* (No. 2) [1905] 1 K. B. 728.

(e) *Horley v. Rogers* (1860) 2 El. & El. 674; *Reeve v. Yates* (1862) 1 H. & C. 435. Only male persons are intended (see *Peters v. Cowie* (1877) 2 Q. B. D. 131).

(f) Act of 1601, s. 4; Act of 1815, s. 5; Act of 1844, ss. 57, 58.

The 'casual poor' on the other hand may, in general, be removed, and are entitled to relief only till such removal can be effected (*a*). Moreover, all 'casual poor' born in Scotland or Ireland, the Isles of Man, Scilly, Jersey, or Guernsey, who have no settlement in England, may, upon complaint of any guardian, relieving officer, or overseer, be removed by the order or warrant of two justices of the peace, or (in a proper case) of a stipendiary or metropolitan police magistrate (*b*), to the place of their birth, together with their families; and casual poor who have a known place of settlement in England (wherever born) may be removed, by the like order or warrant, together with their families, to the place of such settlement (*c*).

The removal order is obtained, upon complaint of the parish (or union) to which the paupers have become chargeable (*d*); the chargeability being proved by the certificate of the guardians (*e*). But notice in writing of the order, accompanied by a statement in writing of the ground of the removal, must be sent to the parish (or union) on which it is made (*f*). If the order is submitted to, or if no notice of appeal is given within twenty-one days, the pauper is to be removed accordingly; but if such notice is given within that period, the pauper is to be kept where he has become chargeable, until the appeal, if duly prosecuted, shall have been determined (*g*). The appeal is to the court of quarter sessions having jurisdiction

(*a*) See the Pauper Lunatics Discharge and Regulations Act, 1871, and the Casual Poor Act, 1882, which regulate their treatment in casual wards and work-houses.

(*b*) Poor Removal Acts, 1845; 1861, c. 76; 1862; 1863.

(*c*) Poor Removal Act, 1846; Poor Law Procedure Act, 1848; Poor Law Amendment Acts, 1849, s. 3; 1851, s. 13; Poor

Removal Act, 1861, s. 2; Union Chargeability Act, 1865; Paupers Conveyance Expenses Act, 1870; Poor Law Act, 1899.

(*d*) Poor Relief Act, 1662, s. 1; Union Chargeability Act, 1865, s. 2.

(*e*) Poor Law Amendment Act, 1844, s. 69, and Act of 1848, s. 11.

(*f*) Act of 1834, s. 79; Act of 1848, ss. 2, 3, 4.

(*g*) *Ibid.* ss. 79, 80, 81, 83.

in the place from which the removal is directed (a). The court may order the parish (or union) against which the appeal shall be decided, to pay reasonable costs to the other (b) ; and, where the respondents succeed, such costs will include the relief and maintenance of the pauper from the time of the notice of the order of removal (c).

If a casual pauper has no known place of settlement in England, and was not born in Scotland, Ireland, or some other place to which he may be removed, then he must remain of necessity in the place where he has become chargeable. And he may claim relief there, so long as he continues to be in want, upon the same footing with its settled poor ; unless and until some place be afterwards discovered wherein he may claim a settlement. There are also some particular cases in which the removal of a casual pauper to his or her place of settlement or birth is illegal ; for the wife of such a pauper cannot, if her husband has no settlement, be removed to her place of maiden settlement, so as to separate her from her husband, unless by mutual consent (d), nor can a child (whether legitimate or otherwise) be taken away from its mother during its time of nurture, that is, until the age of seven years. And even though an order of removal be duly made, still if the pauper, by reason of sickness or infirmity, is not in a fit state to travel, the execution of the order must be suspended, till the justices are satisfied that it may be safely executed (e) ; such suspension extending also to any others of the pauper's family included in the removal order (f). Also, persons in legal custody cannot be removed, under the Poor Laws, from the parish where

(a) Act of 1662, s. 2 ; Poor Removal Acts, 1697, s. 6, and 1848. 113 ; *Re Ethel Brown* (1884) 13 Q. B. D. 614.

(b) Act of 1834, s. 82 ; Poor Law Procedure Act, 1848, s. 5 ; Quarter Sessions Act, 1849, ss. 4, 5. (e) Poor Removal Act, 1795, s. 2 ; Poor (Settlement and Removal) Act, 1809, s. 3 ; *R. v. Llanllechid* (1860) 2 El. & El. 530.

(c) Act of 1834, c. 76, s. 84.

(d) *R. v. Eltham* (1804) 5 East,

(f) Act of 1809, s. 3.

they are confined. It is of particular importance to remember, that, in general, no person may now be removed from a parish (or union) in which he has resided for one whole year (a) next before the application for a warrant for his removal; such period of residence sufficing to ensure his irremovability, although it may not confer on him a settlement (b). This is called a *status of irremovability*. Further, a pauper may not be removed for becoming chargeable in respect of relief made necessary by sickness or accident; unless the justices shall state in the warrant that they are satisfied that the sickness or accident will produce permanent disability (c). And a woman residing with her husband at the time of his death cannot be removed till twelve calendar months afterwards, if she shall so long continue his widow (d); nor a woman deserted by her husband, if after the desertion she reside for one year in such a manner as would, if she were a widow, render her irremovable (e). And a child under the age of sixteen, whether legitimate or illegitimate, residing with his or her father or mother, step-father or step-mother, or reputed father, may not be removed; unless the person with whom such child is residing may lawfully be removed (f).

(a) Union Chargeability Act, 1865, s. 8. See *Machynlleth v. Pool* (1869) L. R. 4 Q. B. 592; *R. v. St. Olaves* (1873) L. R. 9 Q. B. 38.

(b) By the Poor Removal Act, 1846, s. 1, any time passed in prison, or in military or naval service, or as an in-pensioner in Greenwich or Chelsea Hospitals, or in confinement in a lunatic asylum, or as patient in a hospital, or during which parochial relief shall have been received, is to be excluded from the computation; and so also the time during which any person is detained under the Habitual Drunk-

ards Act, 1879 (42 & 43 Vict. c. 19, s. 32), or in a school under the Industrial Schools Act, 1866 (29 & 30 Vict. c. 118, s. 31), must be excluded from such computation.

(c) Poor Removal Act, 1846, s. 4.

(d) *Ibid.* s. 2.

(e) Poor Removal Act, 1861, s. 3; *R. v. St. Mary, Islington* (1870) L. R. 5 Q. B. 445; *R. v. St. George's-in-the-East*, *ibid.* 364; *R. v. Cookham* (1882) 9 Q. B. D. 522; *Tewkesbury v. Birmingham* [1904] 2 K. B. 395.

(f) Poor Removal Acts, 1846, s. 3; 1861, s. 2; *R. v. St. Mary*



II. *As regards the Administration of the Poor Law, and the Assessment and Collection of the Poor Rate.*—The duty of administering relief, where a parish is under the government of guardians, or of a select vestry, belongs to those authorities, according to the provisions of the Acts under which they have been respectively appointed, and subject to the superintendence of the Local Government Board. Liverpool, however, is the only place where the Poor Law is now administered by a select vestry; fifteen other parishes or places are, for Poor Law purposes, managed by authorities established under local Acts (a); and all other parishes are now managed by separate boards of guardians, or else form parts of some union managed by a board of guardians for the union. Also, with some very rare exceptions, there are now no extra-parochial places for civil purposes; for all places, which before 1857, were extra-parochial, were, by an Act of that year (b), to be deemed parishes of themselves for civil purposes, and power was given to appoint overseers for such places; and all such places for which in 1868 no overseer had been appointed, or for which no overseer was then acting, were for all civil parochial purposes incorporated with the next adjoining parish (c).

In all cases of sudden and urgent necessity arising in a parish under the government of guardians or of a select vestry, any overseer is empowered and required by law, whether the applicant for relief is settled in the parish or not, to give him or her such necessary temporary relief as the case may require; and if the overseer refuses to give such necessary relief, and the pauper is not settled or usually resident in the parish to which the overseer belongs, any justice of the peace may, by

<p><i>Arches, Exeter</i> (1862) 1 B. &amp; S. 890; <i>Mitford Union v. Wayland Union</i> (1890) 25 Q. B. D. 164.</p> <p>(a) Act of 1844, ss. 64, 65; Poor Law Audit Act, 1848, s. 12;</p>	<p>and Poor Law Amendment Act, 1867, s. 2.</p> <p>(b) Extra-Parochial Places Act, 1857 (20 Vict. (1857) c. 19), s. 1.</p> <p>(c) Poor Law Amendment Act, 1868, s. 27.</p>
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an order under his hand or seal, direct such necessary relief to be given—the overseer who disobeys such order incurring a penalty not exceeding 5*l.* (a). And whatever may be the settlement or residence of the pauper, any justice of the peace is empowered to order *medical* relief in all cases of sudden and dangerous illness; the overseer here also being subject to the penalty of 5*l.*, in case of disobedience (b). Also, in unions formed under the Poor Law Amendment Acts, any two justices of the peace usually acting for the district may, at their discretion, order any adult person, who is unable to work and is entitled to relief, to be relieved, if he desires it, without residing in the workhouse; but in such a case, one of the justices must certify, of his own knowledge, that the person is unable to work (c). And it is now made lawful for the guardians to permit, at their discretion, a husband and wife admitted into a workhouse to live together, provided either of them shall be infirm, sick, or disabled by any injury, or shall be above the age of sixty years; but every such case must be reported forthwith to the Local Government Board (d).

The duty of making and levying the poor rate, or parochial fund for the relief of the poor, belongs, subject (as regards rural parishes) to the provisions of the Local Government Act, 1894, to the churchwardens and overseers of the parish; and the concurrence of the inhabitants at large is not necessary (e). For the better execution of these duties, the statutes authorise the appointment of *collectors* and *assistant overseers* for the parish or (it may be) for the separate townships therein (f). And here

(a) Act of 1834, s. 54. And see *A.-G. v. Merthyr Tydfil* [1900] 1 Ch. 516, for the powers of guardians to grant relief to able-bodied persons in cases of sudden or urgent necessity.

(b) *Rezv. Kerr* (1793) 5 T.R. 159.

(c) Act of 1834, s. 27; Act of 1848, s. 12; Outdoor Relief

Friendly Societies Act, 1894.

(d) Act of 1847, s. 23; Divided Parishes Act, 1876, s. 10.

(e) Act of 1601, s. 1; Act of 1844, s. 63.

(f) Poor Rate Act, 1839; Act of 1844, ss. 61, 62; Poor Law Amendment Act, 1866, s. 10; Local Government Act, 1894.

it is convenient to observe, that the office of overseer is in general, compulsory, excepting in the cases of the persons enumerated in the foot-note below (a); and a woman may fill the office (b). In the case of rural parishes, the churchwardens have ceased to be overseers; and the appointment of overseers, and also of assistant overseers, is now in such parishes vested in the parish council, or in the parish meeting, created by the Local Government Act, 1894. In rural parishes having a parish council, there is transferred to that council some, but not all, of the powers, duties, and liabilities of the overseers, or of the churchwardens and overseers (c). In urban parishes, the churchwardens remain overseers; and the other overseers are still appointed by two justices of the peace, unless an order has been made by the Local Government Board, authorising the council of the borough or urban district to appoint or act as overseers, and to appoint assistant overseers (d). In the metropolis, the borough councils are the overseers (e).

The poor rate is raised prospectively (f); and for some given portion, usually one half part, of the year. It is at so much in the pound, according to the parochial assessment; and upon a scale adapted to the probable exigencies of the parish. By the Poor Relief Act, 1601, it is directed to be raised by taxation of every "*occupier* of lands, houses, tithes impropriate, propriations of tithes, coal mines, or saleable underwoods" in the parish.

(a) Peers and members of parliament; justices of the peace; aldermen of the City of London; clergymen; dissenting ministers; practising barristers and solicitors; registered medical practitioners and dentists; officers of the courts of law, of the army and navy, and of the customs and excise; inspectors under the Factory Acts; and registrars of births, deaths, and marriages

(Archbold, *Poor Law* (15th edn.), p. 137).

(b) *R. v. Stubbs* (1788) 2 T. R. 395; Local Government Act, 1894, s. 20.

(c) *Ibid.* ss. 5, 6.

(d) *Ibid.* s. 33 (1).

(e) London Government Act, 1899, s. 11 (1).

(f) *R. v. Gloucester* (1793) 5 T. R. 346.

And a man is rateable for all that he occupies in the parish, whether he is resident there or not; for example, in respect of a box at a theatre, or in respect of moorings in the river, or in respect of land used for advertising (*a*), or in respect of a tramway (*b*), tunnel, sewer, and the like. So a municipal corporation has been held to be in rateable occupation of a large track of moorland used only as a gathering ground for water which flowed naturally from it to waterworks and reservoirs belonging to the corporation (*c*). Corporate property (*e.g.*, the railroad of a railway company) is deemed for this purpose to be in the occupation of the corporation (*d*).

No rate can be imposed on property in the occupation of the Crown, or its servants, or occupied for the purposes of the administration of the government of the country; for the Crown is not bound by the Poor Relief Act, 1601 (*e*). Upon this principle, property used for the administration of justice, such as assize courts (*f*), prisons, and police (*g*), and premises used for the purposes of the army (*h*), or of the territorial force (*i*), are not rateable.

But property is not exempt merely on the ground that it is occupied for public purposes (not being the purposes of the Crown), such as local government, public education, or charity (*k*). Thus, premises used for the administrative business of county and borough councils (*l*),

(*a*) Advertising Stations (Rating) Act, 1889.

(*b*) *Pimlico v. Greenwich* (1873) L. R. 9 Q. B. 9.

(*c*) *Liverpool Corpn. v. Chorley Union* [1913] A. C. 197.

(*d*) *Société Telegraphie v. Penzance Union* (1884) 12 Q. B. D. 552.

(*e*) *Jones v. Mersey Docks* (1865) 11 H. L. C. 443, *per* Blackburn, J., at p. 463.

(*f*) *Coomber v. Berkshire Jus-*

*tices* (1883) L. R. 9 App. Ca. 61.

(*g*) *Ibid*; *Gambier v. Lydford* (1854) 3 E. & B. 346.

(*h*) *R. v. Stewart* (1857) 8 E. & B. 360.

(*i*) *Wixon v. Thomas* [1912] 1 K. B. 690.

(*k*) *London County Council v. Erith & West Ham* [1893] A. C. 562.

(*l*) *Middlesex C. C. v. St. George's Union* [1897] 1 Q. B. 64.

reformatory or industrial schools (*a*), and council schools (*b*), and workhouses (*c*), are not exempt from liability to rates. Churches and chapels and meeting houses 'exclusively appropriated to public religious worship,' are, however, exempt by statute (*d*), and by the Rating Act, 1869, the rating authority may at its discretion exempt Sunday schools and ragged schools (*e*). Voluntary schools, *i.e.* schools erected and maintained by religious or other voluntary effort, were exempted by statute (*f*); and it seems that this exemption extends to 'non-provided' schools under the Education Act, 1902, which have, in effect, superseded the former voluntary schools (*g*).

The Act of 1601 was extended by the Rating Act, 1874 (*h*), to land used for a plantation or wood, or for the growth of saleable underwood, to rights of shooting and fishing, and to mines of every kind (other than the coal mines, which were already rateable); and underwoods are now rateable under this Act, and not under the Act of Elizabeth. By the Agricultural Rates Act, 1896 (*i*), occupiers of agricultural land are exempted from half their rates; one half being paid, out of the Local Taxation Account, by the Commissioners of Inland Revenue. In general, the tenant and not the landlord is considered as the *occupier* within the statute of Elizabeth; but if the

(*a*) *R. v. West Derby* (1875) L. R. 10 Q. B. 283; *Tunncliffe v. Birkdale Overseers* (1888) 20 Q. B. D. 450.

(*b*) *R. v. West Bromwich School Board* (1884) 13 Q. B. D. 929.

(*c*) *Governors of Poor of Bristol v. Wait* (1836) 5 A. & E. 1; *R. v. Wallingford Union* (1839) 10 A. & E. 259.

(*d*) Poor Rate Exemption Act, 1833.

(*e*) 32 & 33 Vict. c. 40, s. 1; *Bell v. Crane* (1873) L. R. 8 Q. B. 481.

(*f*) Voluntary Schools Act, 1897, s. 3. And see, for scientific and literary societies receiving grants from the Board of Education, *Hornsey School of Art v. Edmonton* (1906) 4 L. G. R. 178; 94 L. T. 203.

(*g*) See *ante*, pp. 56–57.

(*h*) 37 & 38 Vict. c. 54.

(*i*) 59 & 60 Vict. c. 16; a temporary Act continued by 1 Edw. 7 (1901) c. 13, and 5 Edw. 7 (1905) c. 8, and since 1910 continued annually by the Expiring Laws Continuance Act.

rateable hereditament be let for a term not exceeding three months, the occupier is entitled, under the Poor Rate Assessment and Collection Act, 1869, to deduct the amount paid by him, in respect of poor rate, from the rent due to the owner. And by the same Act, where the yearly rateable value of a dwelling-house does not exceed 8*l.* (or in the metropolis 20*l.*, in Liverpool 13*l.*, in Manchester or Birmingham 10*l.*), the owner may agree to be ordered to be rated instead of the occupier (*a*).

The Act of 1601 further directed the poor rate to be raised, by the taxation of "every inhabitant, parson, " vicar, and other " of the parish ; and, as an ' inhabitant,' a man was formerly liable to be rated according to his apparent ability, that is, according to the value of the stock in trade, and other local and visible personal property, he had within the parish, and of which he made profit. But this liability to taxation, in respect of inhabitancy, is now obsolete (*b*).

By the Parochial Assessment Act, 1836, no poor rate was to be of any force which should not be made on an estimate of the net annual value of the several hereditaments rated ; that is to say, the rent at which the same might reasonably be expected to let from year to year, free of all usual tenant's rates and taxes, and tithe commutation rentcharge, but deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses necessary to maintain the premises in a state to command such rent. And that statute prescribed also in what form the rate should be made, and what particulars it should comprise ; and required that the parish officers should sign a declaration at the end, to the effect that

(*a*) *Iles v. West Ham Union* (1881) 8 Q. B. D. 69 ; L. R. 8 App. Ca. 386. This principle has been made applicable to the collection of the borough rate (Municipal Corporations Act, 1882, s. 147) and the general

district rate in urban districts (Public Health Act, 1875, s. 211).

(*b*) See Poor Rate Exemption Act, 1840 ; since renewed annually by the Expiring Laws Continuance Acts.

the particulars therein were true and correct, so far as they had been able to ascertain them by their best endeavours. The provisions, relating to the assessment of premises, and of appeals against such assessments, are now in general governed by the Union Assessment Committee Acts, 1862 and 1864, extended by the Union Assessment Act of 1880 to single parishes. These Acts apply to the whole of England with the exception of the metropolis, which is governed by the Metropolis Valuation Act, 1869, and of a few other specified important places (a).

Under the Union Assessment Committee Acts, the guardians of every union appoint an assessment committee. This committee revises the valuation list of premises in the parish sent to it by the overseers, and hears any objections to the list made by any person aggrieved. It may, on such hearing, alter the valuation of any premises as it thinks just. It is a condition precedent to any appeal to sessions against the rate, that this notice of objection be given to the assessment committee (b). Any person aggrieved (having failed in his objection before the assessment committee) may appeal to the next practicable quarter sessions (c) against the rate. There is also an appeal against the rate to special sessions under the Parochial Assessment Act, 1836 (d); but only on the ground of 'inequality, unfairness, or incorrectness' in the valuation list. From special sessions there is an appeal to quarter sessions. The appeal to quarter sessions direct is therefore in most cases to be preferred.

The justices in general sessions, or at quarter sessions, have power to affirm, quash, or amend the rate; or, if it becomes necessary to set the whole aside, may order

(a) For a list of these, see Geo. 2, c. 38, s. 4; *Imperial and Ryde, Rating* (2nd edn.), pp. 511, 512 n.

(b) Act of 1864, s. 1.

(c) Poor Relief Act, 1743 (17

Geo. 2, c. 38), s. 4; *Imperial and Grand Hotels Co. v. Christchurch* [1905] 2 K. B. 239.

(d) Ss. 6, 7.

the overseers to make a new rate (*a*). They have authority also to award costs to the successful party (*b*); and they may state a special case on a point of law for the opinion of the King's Bench Division. Justices who are ratepayers of a parish, the rate for which is appealed against, cannot vote (*c*) at the quarter sessions for a county on appeal against a rate for the parish in which they are ratepayers (*d*); but they are not disqualified by reason of their being ratepayers of some other parish in the union than that for which the rate appealed against is made (*e*). Judges of the High Court are not in any case now disqualified from hearing appeals to the High Court by reason of their being ratepayers of the parishes concerned (*f*).

Provision has also been made against poor rates being unjustly raised, and against money justly raised being misapplied. The rate must always be formally (*g*) approved by two justices (*h*); and public notice of every rate must be given by affixing notice thereof on the door of the parish church (*i*). It is further the duty of the overseers, and of all persons having the collection, receipt, or distribution of the poor rate, to render to the proper auditors, once in every half-year, (and oftener if required by the Local Government Board,) an account of all moneys received and expended, and to verify the same on oath if required (*k*). They are not to make any profit by their office (*l*); and all balances remaining from time to time in the hands of the parish officers may

(*a*) Poor Relief Act, 1743, s. 6 ;  
Act of 1836, s. 6.

(*b*) Act of 1743, s. 4.

(*c*) Justices Jurisdiction Act,  
1742, s. 3.

(*d*) Act of 1601, s. 1.

(*e*) Act of 1864, s. 6.

(*f*) Jurisdiction in Rating Act,  
1877, ss. 1, 3.

(*g*) *R. v. Dorchester JJ.* (1720)  
Str. 393.

(*h*) Act of 1601, s. 1.

(*i*) Poor Rate Act, 1743 (17  
Geo. 2, c. 3), as amended by  
Parish Notices Act, 1837 (7 W. 4,  
and 1 Vict. c. 45).

(*k*) District Auditors Act,  
1879.

(*l*) Poor Law Amendment Act,  
1834, s. 77; *Henderson v. Sher-*  
*borne* (1837) 2 M. & W. 236.



be recovered from them by a summary proceeding before two justices of the peace (*a*). The overseers are bound also, in all cases, to render an account at the end of their year of office (*b*). We may here add, that the valuation list before referred to is in general conclusive to show the value of the premises for all local rates, but not (outside the metropolis) for King's taxes.

As was hinted at the beginning of this chapter, it is necessary to refer, however briefly, to the provisions of three important statutes, which, though no part of the Poor Law in the ordinary sense of the term, yet have a very powerful indirect bearing upon Poor Law administration.

The first of these is the Unemployed Workmen Act of 1905, which, as amended by the Labour Exchanges Act, 1909, establishes 'distress committees' throughout the country, with power to recommend applicants for work, whose cases they may consider more suitable for treatment under the Act than under the Poor Law, to a 'central body,' which may assist such person, either by aiding his emigration or removal to another area, or by providing for him temporary work. In London, such 'distress committees' consist of members of the borough councils and of the boards of guardians within the district of each, as well as of persons experienced in the relief of distress; and the 'central body' is composed of delegates from the 'distress committees,' from the London County Council, and co-opted persons (*c*). Similar 'distress committees' are created in all boroughs and urban districts with a population of not less than 50,000 at the last census; and in smaller boroughs and districts which apply for them. 'Distress committees'

(*a*) Vestries Act, 1831; Poor Law Amendment Act, 1834, ss. 47, 99; Poor Rate Act, 1839; Poor Law Amendment Act, 1844, ss. 32-38; *R. v. St. Marylebone* (1836) 5 A. & E. 268. (b) Poor Law Amendment Act, 1834, s. 47. (c) Unemployed Workmen Act, 1905, s. 1.

and central bodies may also be established for any county or part of a county (a).

The second of the Acts deserving special notice is the Labour Exchanges Act, 1909, which, taking over an idea first introduced into the statute book by an Act of the year 1902 (b), has established throughout the country a network of Labour Exchanges, under the management of the Board of Trade, for the purpose of collecting or furnishing information respecting employers who desire to engage work-people, and work-people who seek engagement or employment. By this Act, the former powers of the 'central bodies' or 'distress committees' described above to maintain such agencies, are not to be exercised except with the sanction of the Local Government Board, even after consultation with the Board of Trade (c).

Finally, by the Old Age Pensions Act, 1908, and its amendments (d), provision is made, under specified conditions, for the award of inalienable State pensions to persons of limited means who have attained the age of seventy, and have for the last twenty years been British subjects residing in the United Kingdom. 'Local pension committees' are appointed by the councils of boroughs and urban districts having a population of 20,000, and, outside such areas, by the county councils for their respective counties. Such committees decide upon the applicant's title to a pension; but the actual distribution is made through the Post Office.

(a) Act of 1905, s. 2.

(c) Act of 1909, s. 1 (4).

(b) Labour Bureaux (London)

(d) Act of 1911.

Act, 1902.

## CHAPTER VIII.

OF THE LAWS RELATING TO THE REGISTRATION OF  
BIRTHS, DEATHS, AND MARRIAGES.

THE registration of births, deaths, and marriages, is either civil or ecclesiastical ; the ecclesiastical registration being far the more antient.

I. *Ecclesiastical Registration*.—This system is said to be coeval with the Reformed Church ; having been first established in the thirtieth year of Henry the Eighth, 1538 (*a*). Various enactments for its confirmation were passed in succeeding reigns ; and by a canon (*b*) in the time of James the First, still in force, and by several statutes, particularly the Parochial Registers Act, 1812, further provisions were made for its regulation. The provisions of the Parochial Registers Act, 1812, still remain in force as regards the registration of baptisms and burials, although not of marriages (*c*). The Act provides, that registers of public and private baptisms and burials, solemnised according to the rites of the Established Church, in any parish or chapelry in England, shall be made by the rector, vicar, curate, or other officiating minister of the parish, in books of parchment or durable paper, and that in such books there shall be inscribed, within seven days at the latest after the ceremony (*d*), such particulars as are set forth in the schedule to the Act (*e*) ; and that, where the baptism or burial is

(*a*) Godolph. *Abridg.* 144.

tration Act, 1836, s. 1.

(*b*) Canon 70 of 1603 (1 Jac. 1).

(*d*) S. 3.

(*c*) Births and Deaths Regis-

(*e*) S. 1.

solemnised elsewhere than in the parish church or churchyard, by a clergyman not being the rector, vicar, or curate of the parish, he must transmit on that or the following day a certificate of the solemnisation of the ceremony, to the minister of the parish, to be entered among the parish registers (*a*). The books containing such entries are to be carefully preserved by the officiating minister in a dry well-painted iron chest, and are not to be removed therefrom, except for the purpose of making such entries, or for other the specific purposes authorised by the Act (*b*) ; and an annual copy of the contents of these register books, certified by the minister, is to be transmitted by the churchwardens, by post, to the registrar of the diocese, who is bound to make a report to the bishop whether he has duly received such copy or not (*c*), and to make out alphabetical lists of the entries. These lists are to be open to public search, at reasonable times, upon payment of certain fees (*d*).

With regard to burials, the statute of 1812 applied only to such interments as took place according to the rites of the Established Church. Accordingly, in 1853, it was necessary to make other provision (*e*) for the registration of interments which took place in cemeteries and grounds provided under the Burial Act, 1852. And by the Registration of Burials Act, 1864, and the Burial Laws Amendment Act, 1880, these or the like provisions have been extended to all burials whatsoever, which take place in any burial ground in England ; the duty of registration, where not otherwise provided for, being thrown on the company, body, or persons to whom the burial ground belongs, or on the relatives of the deceased. The register books are directed to be sent from time to time to the registrar of the diocese ; and any person who

(*a*) Parochial Registers Act, 1812, s. 4, amended by Burial Act, 1857, s. 16.

(*b*) *Ibid.* s. 5.

(*c*) *Ibid.* ss. 7, 8.

(*d*) *Ibid.* s. 12 ; *Steele v. Williams* (1853) 8 Exch. 625.

(*e*) Burial Act, 1853 (16 & 17 Vict. c. 134).

knowingly inserts any false entry in these registers, or in the certified copies thereof, or who wilfully destroys or injures the same, or knowingly certifies any false copy, is guilty of felony, and may be sentenced to penal servitude or to imprisonment (a); as also is any person who forges any such register, or any certified copy of any part thereof (b). It will be observed, that the ecclesiastical registers do not afford exact evidence as to the dates of births and deaths, but only the inferential evidence to be derived from the circumstances of baptisms and burials.

II. *Civil Registration*.—It was also found that, under the ecclesiastical method of registering baptisms and burials, the entries were often incomplete and inaccurate, and also otherwise inadequate; for they extended only to such births and deaths as were afterwards attended with the proper ceremonies of the Church. And therefore, in the year 1836, in consequence of the report of a committee of the House of Commons appointed in 1833 to consider the general state of parochial registers and the laws relating thereto, a new system of registering births and deaths, wholly independent of the ecclesiastical method of registering baptisms and burials, was introduced by the Births and Deaths Registration Act, 1836 (c). This Act, with the Marriage Act of the same year (d), introduced into England a complete system of registration of births, marriages, and deaths. Registration districts were established, and registrars therefor appointed; and various provisions were enacted, as regards the duties of these officers in registering births and deaths. The law upon the subject is now contained mainly in the Births and Deaths Registration Acts, 1836–1901; and particularly in the Births and Deaths Registration

(a) Forgery Act, 1861, ss. 36, 37, as amended by the Penal Servitude Acts, 1864 and 1891, and the Forgery Act, 1913, s. 20.

(b) Forgery Act, 1913, s. 3.

(c) 6 & 7 Will. IV. c. 86.

(d) 6 & 7 Will. IV. c. 85.

Act, 1874 (*a*), which repealed much of the earlier legislation on the matter.

It is to be understood, then, that, under the combined effect of the Act of 1836, and the subsequent Registration Acts, every Poor Law union or parish is divided into registration districts (*b*); each of which is called by a distinct name, and is in charge of a registrar (*c*), who must be either resident or have a known office therein (*d*), though he may in general act by deputy (*e*). The registrars of each union are subjected to the supervision of their superintendent registrar, an office to be filled as of right, (in case of his due qualification and acceptance,) by the clerk to the guardians of the union, during the pleasure of the Registrar-General (*f*). The Registrar-General is an official appointed under the Great Seal, holding office during the pleasure of the Crown (*g*), and exercising authority over all superintendent registrars; and in fact, it is to him that (subject only to such regulations as may be made by the Local Government Board (*h*)), the management of the whole system of this registration, where no specific directions are given by the Acts, is entrusted. Provision is also made for the establishment of a proper office, to be called the General Register Office, and of register offices for each union, to be placed under the respective superintendents, and for the preservation and safe custody of the registers when collected (*i*). The Acts also contain regulations as to the uniform construction and durable materials of the books wherein the

(*a*) 37 & 38 Vict. c. 88.

(*b*) Act of 1874, s. 21; Act of 1901.

(*c*) Act of 1836, ss. 7, 10, 11; Poor Law Amendment Act, 1866, s. 1.

(*d*) Act of 1836, s. 16.

(*e*) *Ibid.* s. 12.

(*f*) *Ibid.* ss. 7, 10, 11; Poor Law Amendment Act, 1866, s. 1; Local Government Act, 1888, s. 24, sub-s. (2) (*d*).

(*g*) Act of 1836, s. 2. As to the registration of births and deaths occurring among officers and soldiers of His Majesty's land forces out of the United Kingdom, see Registration, etc. (Army) Act, 1879.

(*h*) Act of 1836, s. 5; Local Government Board Act, 1871, ss. 2, 7.

(*i*) Act of 1836, s. 9.

entries of all births, deaths, and marriages, are to be made (a).

The practical working out of the system depends mainly upon the registrars, who have the following duties to perform.

*As to births.*—Every registrar is authorised and required to inform himself carefully of every birth which shall happen in his district; and to learn and register, as soon after the event as may conveniently be done, such particulars as are required, by the schedule annexed to the Act of 1874, to be registered touching such birth (b). It is the duty of the father and mother of any child born alive, or, in their default, of the occupier of the house where it is born (if he knows of the birth), and of each person present, at such birth, and of the person having charge of the child, within forty-two days after the day of such birth, to give to the proper registrar information of the particulars required to be registered concerning such birth; and, in his presence, to sign the register (c). Even after a period of three months from the birth of the child has expired, registration may still take place. But, in that case, a solemn declaration before the superintendent registrar as to the truth of the particulars required must be made by one of the persons on whom the statute imposes the duty of giving the information as to the birth; and he or she must sign the register in the presence both of the superintendent registrar and of the registrar of the district (d). After the expiration of twelve months from the time of the birth, no registry thereof can be made, except with the written authority of the Registrar-General; such authority being duly entered on the

(a) Act of 1836, s. 17.

(b) Act of 1874, ss. 4, 18; *In re Wintle* (1870) L. R. 9 Eq. 373.

(c) Act of 1874, s. 1; *R. v. Price* (1840) 11 A. & E. 727. By the Notification of Births Act, 1907 (7 Edw. 7, c. 40), local authorities have power, on adopt-

ing the Act, to compel the father and other persons in attendance upon the mother to give notice of a birth, within *thirty-six hours* of its occurrence, to the medical officer of health for the district.

(d) Act of 1874, s. 5.

register (*a*). Births on board ships at sea are subject to different provisions (*b*).

*As to deaths.*—It is the duty of every registrar to inform himself carefully of every death which happens in his district ; and to register such particulars concerning the same as are specified in the schedule to the Act of 1874 (*c*). And it is the duty of the nearest relatives of the deceased, present at the death or in attendance during his last illness, and, in default of such relatives, of any other relative in the same district, and, in default of any such persons present at the death, of the occupier of the house (if he knows of such death having taken place), and, in his default, of each inmate of the house, and of the person causing the body to be buried, to give to the registrar information within the five days next following the day of death, according to the best of his knowledge and belief, of such particulars as are required to be registered touching the death (*d*). In the case of an inquest upon the body, such information is to be conveyed to the registrar, by the coroner before whom such inquest is held (*e*).

Four times in every year, each registrar is to deliver, to his superintendent, a certified copy of the entries made by him in his registry book, and finally the register itself, upon the book being filled ; and the superintendent, at the same intervals, is to transmit the same to the Registrar-General (*f*). The duties of the Registrar-General, into whose hands the documents thus ultimately fall, consist—in addition to the general supervision of the working of the whole system—in examining, arranging, and indexing the certified copies so sent ; and he also compiles abstracts of their contents, and transmits the same, once in every year, to a Secretary of State, by

(*a*) Act of 1874, s. 5.

(*d*) *Ibid.* s. 10.

(*b*) Act of 1874, s. 37 ; Merchant Shipping Act, 1894, s. 745.

(*e*) *Ibid.* s. 16 ; Coroners Act, 1887, s. 45.

(*f*) Act of 1836, ss. 32, 34.

(*c*) Act of 1874, s. 14.



whom such abstracts are afterwards laid before Parliament (a).

*As to marriages.*—The forms and conditions of marriages before a registrar have been fully discussed at an earlier stage of this work (b). It is sufficient here to observe, that, by virtue of the statutes hereunder mentioned (c), a central register office of births, deaths, and marriages is provided, and that all persons authorised to solemnise marriages are required to keep a register of marriages solemnised by them, and to transmit copies thereof quarterly to the superintendent registrar of their district. The superintendent registrar must in turn send certified copies to the Registrar-General's office (d).

Entries in the registers of births, deaths, and marriages, and certified copies thereof, are receivable in evidence to prove the contents thereof (e). Thus the fact and date of a birth, marriage, or death may be proved by certified copies of the entry in the register relating thereto (f). Any person who wilfully makes any false answer to any question put to him by the registrar relating to the particulars required to be entered in any register of births or deaths, or gives false information concerning any birth or death, or makes any false statement with intent to have it inserted in any register of births or deaths or marriage, or knowingly and wilfully makes, for the purpose of being inserted in any register of marriage, a false statement as to any particular required by law to be registered relating to any marriage, is guilty of a misdemeanour, and may be sentenced to penal servitude or imprisonment (g).

(a) Act of 1836, s. 6.

(b) See *ante*, vol. ii. pp. 393–401.

(c) Births and Deaths Registration Act, 1836 (6 & 7 Will. 4, c. 86); Marriage Act, 1836 (6 & 7 Will. 4, c. 85); Births and Deaths Registration Act, 1837 (7 Will. 4, and 1 Vict. c. 22).

(d) See *ante*, vol. ii. pp. 401–430

(e) Marriage Act, 1836, ss. 31–38; Births and Deaths Registration Act, 1874, ss. 1–8, 32, 37, 38.

(f) *Doe v. Barnes* (1834) 1 Moo. & Rob. 386; *In re Goodrich* [1904] P. 138.

(g) Perjury Act, 1911, ss. 3, 4.

Before we conclude this chapter, we may remark, that, at the time of the introduction of the system of *civil* registration above explained, certain Commissioners were appointed for inquiring into the state and authenticity of any registers (other than parochial) which at that time existed ; and they succeeded in the course of a few years, in discovering about seven thousand such registers which were deemed authentic. The documents so discovered were, by the Non-Parochial Registers Act, 1840, placed under the care of the Registrar-General, together with the records of marriages and baptisms theretofore solemnised in the Fleet and King's Bench prisons, and at other irregular places ; and, by an express provision of the Act, all registers and records deposited in the General Register Office by virtue of the Act, of marriages and baptisms in the Fleet and elsewhere, are deemed to be in legal custody, and to be receivable in evidence accordingly in all courts of justice (a).

(a) Act of 1840, s. 6 ; Act of 1858, s. 3. See, for a full list of the old registers, the Registrar-General's Report for the year 1895, p. 29.

## CHAPTER IX.

## OF THE LAWS RELATING TO PUBLIC CONVEYANCES.

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It has in modern times been the policy of the legislature of this country to provide for a general supervision of public conveyances, partly by direct statutory rules, partly by empowering government departments to regulate and inspect, partly by authorising local authorities, more particularly county and borough councils, to make by-laws with that object. Until recently, Parliament trusted entirely to private enterprise to provide the means of conveying goods and passengers. Only during the last half century have local authorities begun to acquire and work tramways, light railways, road engines, and, in some few instances, omnibuses. The subject of public conveyances will be considered under five heads, viz. : (I.) Hackney Carriages or Cabs, and Stage Carriages ; (II.) Steam Conveyances and Motor Cars ; (III.) Tramways ; (IV.) Railways ; and (V.) Conveyances by Water.

I. *Hackney Carriages (or cabs), and Stage Carriages (or omnibuses).*—In urban districts, outside the Metropolitan Police District, the borough or urban council is given power to license hackney carriages, omnibuses, and horses, ponies, etc., plying for hire. These powers are given by the Public Health Act, 1875 (*a*), with which are incorporated the clauses of the Towns Police Clauses Act, 1847, ‘with respect to hackney carriages’ (*b*). These sections have been extended to the licensing of omnibuses and stage carriages by the Towns Police Clauses

(*a*) S. 171.(*b*) 10 & 11 Vict. c. 89, ss. 37–68.

Act, 1889 (a). The term 'hackney carriage' includes "every wheeled carriage, whatever may be its form or "construction, used in standing or plying for hire in any "street within the urban district." It would seem, therefore, to include motor cabs (b) as well as the older horse-drawn four-wheelers and hansoms, and Bath chairs drawn by donkeys or hand. In the same way, motor omnibuses are within the definition of 'omnibus' in the Town Police Clauses Act, 1889 (b). An omnibus is there defined as "including every omnibus, char-à-banc, wagonette, "brake, stage-coach, and other carriage plying or standing "for hire by, or used to carry, passengers at separate "fares to, from, or in any part of the urban district;" but does not include tramcars, carriages starting from, and previously hired at, livery stables for particular passengers, or railway omnibuses used for conveying passengers from or to a railway station (c).

As regards hackney carriages, horses, and mules, the urban authority has power both to make by-laws regulating the number of passengers to be carried, the fares, the standing places and other matters, and to grant licenses to proprietors and drivers. And persons allowing carriages to ply for hire, or acting as drivers, without a license, are liable to fines (d). A small charge may be made for a license; but these licenses granted by the local authority are not the same as, and are additional to, the excise duty license payable under the Customs and Inland Revenue Act, 1888, and to the registration fee payable to the council of the county or county borough, on registration of a motor cab or motor omnibus, under the Motor Car Act, 1903.

With regard to omnibuses, urban councils have no power to fix the fares, but may by by-law compel the owner to exhibit a table of fares. They have also powers for a

(a) 52 & 53 Vict. c. 14.

(c) Act of 1889, s. 3.

(b) See the Locomotives on Highways Act, 1896, s. 1 (1).

(d) Act of 1847, s. 68.

variety of other purposes. Thus their by-laws may regulate the number of passengers to be carried, and may fix the stands for omnibuses, and the points at which they may stop for a longer time than is necessary to take up or set down passengers. But there appears to be no power to confine them to particular routes (*a*).

Courts of summary jurisdiction are empowered to deal with many small disputes arising out of the hiring of hackney carriages. Thus, not only are penalties for breaches of the by-laws recoverable in those courts (*b*), but justices have power to determine disputes as to fares, and to order payment of the amount due (*c*), and to fine drivers for taking more than is authorised (*d*). A driver is bound by an agreement with the hirer to take less than the authorised fare ; but an agreement made with the hirer to pay more is not binding on him, and the hirer can recover any excess paid by him (*e*).

In the Metropolitan Police District, hackney carriages and omnibuses are licensed by the Chief Commissioner of Police. The principal Acts relating to this subject are the London Hackney Carriage Acts of 1831, 1843, and 1853, the Metropolitan Public Carriages Act, 1869, and the London Cab and Stage Carriage Act, 1907. In the Act of 1869, stage carriages are so defined as to include omnibuses which ply for hire “in any public street, road, or place, “within the metropolitan police district and the City “of London ;” and ‘hackney carriage’ means any carriage for the conveyance of passengers which plies for hire within the same limits, and is not a stage carriage.

The power to grant licenses for both hackney and stage carriages is conferred on the Secretary of State (*f*) ; but he is empowered to depute his duties under the Act (*g*), and, in practice, deposes them to the Chief Commissioner of Police.

(*a*) Act of 1889, s. 6.

(*b*) Public Health Act, 1875,  
ss. 183, 251, 316.

(*c*) Act of 1847, s. 66.

(*d*) *Ibid.* s. 58.

(*e*) *Ibid.* ss. 54, 55.

(*f*) Act of 1869, s. 6.

(*g*) *Ibid.* s. 12.

The Acts contain a great number of regulations by which penalties are imposed on drivers for misconduct, and for driving without a license, etc., and provisions of a kind which, as regards urban districts, are dealt with by the Towns Police Clauses Acts. The fares to be taken by horse-drawn cabs are regulated by the Act of 1853 (*a*); and the London Cab and Stage Carriage Act, 1907, enables the Secretary of State to fix the fares to be paid by cabs fitted with taximeters (*b*), and expressly extends the definitions in the Act of 1869 of hackney and stage carriages to include carriages propelled by mechanical power (*c*). It also enables the Secretary of State to apply the provisions of the earlier Acts to stage carriages which on every journey go to, or come from, some town or place beyond London (*d*). There are no statutory regulations with regard to the fares to be taken for omnibuses.

II. *Locomotives and Motor Cars*.—A 'light locomotive' within the meaning of the Locomotives on Highways Act, 1896, is a carriage (including a motor car) which weighs, unladen, less than three tons. The maximum legal speed on a public highway is twenty miles an hour, or, within particular limits fixed by regulations of the Local Government Board, ten miles an hour (*e*). But it must not be supposed that no one can be guilty of driving a motor car at an excessive speed if he keeps within these limits. For it is expressly laid down by the Motor Car Act, 1903, that any driver of a motor car on a public highway is guilty of an offence under the Act, if he drives at a speed or in a manner dangerous to the public, having regard to all the circumstances of the case (*f*). The 'licensed locomotives' and 'registered locomotives' which are provided for by the Locomotives Act, 1898, are

(*a*) The fares are recoverable by summary process before a magistrate by virtue of s. 41 of the Act of 1831. The magistrate may decide disputes as to distance.

(*b*) Act of 1907, s. 1.

(*c*) *Ibid.* s. 6.

(*d*) *Ibid.* s. 3.

(*e*) Motor Car Act, 1903, s. 9.

(*f*) *Ibid.* s. 1.

regulated by the specific provisions contained in that Act, which amends the law so as to enable borough and county councils to “permit any waggons drawn or propelled by a locomotive on the highway to carry weights “in excess of those mentioned in section 4 of the Locomotives Act, 1861.” The use of locomotives on highways may also be regulated and restricted by local by-laws. If the owner of a locomotive is aggrieved by a restriction or prohibition placed on the passing of any locomotive over a bridge, he may appeal to the Local Government Board (*a*).

III. *Tramways and Light Railways*.—Statutory authority is required for laying tramways or light railways upon a public highway ; as tram lines laid without such authority are a nuisance at common law, and the persons responsible for laying them may be indicted for so doing (*b*). Power to lay tramways or light railways may, however, be obtained by Provisional Order in accordance with the provisions of the Tramways Act, 1870, or the Light Railways Act, 1896, by a local authority or a company. Generally, the consent of the local authority or road authority is required for making tramways (*c*) ; and the local authority is empowered, after an interval of twenty-one years, to acquire the undertaking by compulsory purchase from the undertakers (*d*). In London most, if not all, of the tramways originally constructed by companies have now been acquired by the London County Council.

(*a*) See 24 & 25 Vict. (1861) c. 70, s. 6.

(*b*) *R. v. Train* (1862) 2 B. & S. 640.

(*c*) Tramways Act, 1870, s. 4. The authorities whose consent is required include the Councils of boroughs, urban districts, and metropolitan boroughs, parish

councils or parish meetings and (for main roads) county councils. See Act of 1870, ss. 3 and 4 ; Public Health Act, 1875, ss. 6 and 313 ; Local Government Act, 1888, s. 11 ; Local Government Act, 1894, ss. 6 and 19 ; London Government Act, 1899, s. 4.

(*d*) *Ibid.* s. 43.

The local authority is empowered to make certain regulations with regard to the speed and stopping of carriages running on tramways, and have the same power of licensing drivers and conductors that they have with regard to hackney carriages (a).

The local authority, or company which promotes the tramway, may also make by-laws, enforceable by penalties, for regulating the travelling of the tramways belonging to it, and for preventing nuisances on its premises (b).

Tramways and light railways are not necessarily distinguishable by the eye. The difference is a purely legal one, and can only be solved by finding out whether the undertaking in question was constructed under the provisions of the Tramways Act, 1870, or under the Light Railways Acts, 1896 and 1912, and the rules made under that Act by the Board of Trade. Light railways may run on public highways, or, like an ordinary railway, on land owned by the company. The special Act or Order under which any given railway was made, must always be studied to appreciate the legal position of the railway; and many of the enactments relating to railways apply to 'light railways' (c).

IV. *Railways*.—These are usually constructed, and to some extent regulated, under the provisions of special Acts from time to time passed for the purpose; but these special or private Acts have certain features in common, as they usually incorporate the Railways Clauses Consolidation Act, 1845 (d), and, in the case of special Acts passed after July, 1863, the Railways Clauses Act, 1863 (e).

(a) Tramways Act, 1870, ss. 46-48; London Cab and Stage Carriage Act, 1907, s. 5.

(b) *Ibid.* s. 46.

(c) Light Railways Act, 1896, s. 12. And see *Blackpool v. Thornton* [1907] 1 K. B. 568;

4 L. G. R. 324; *Wakefield District Ry. v. Wakefield* [1907] 2 K. B. 256. See also *Yorkshire v. Ellis* [1905] 1 K. B. 396.

(d) 8 & 9 Vict. c. 20.

(e) 26 & 27 Vict. c. 92.



But there are also general Acts passed for the purpose of securing a greater uniformity in the administration of railways, and of safeguarding the interests and security of the public against the private and possibly conflicting interests of shareholders in railway companies. Among these, special mention may be made of the Railway Regulation Acts, 1840 to 1893, and the Railway and Canal Traffic Acts, 1854 to 1894. The year 1845 is a very important one in the history of the law of railway construction; for, besides the Railways Clauses Consolidation Act, there were passed in that year the Companies Clauses Consolidation Act, 1845, which consolidated the provisions usually inserted in private Acts incorporating companies, like railway companies, engaged in work of a public nature, and also the Lands Clauses Consolidation Act, 1845, which consolidated the general provisions applicable to the acquisition of land for such purposes, and the compensation to be paid.

The legislature has entrusted the general supervision and regulation of all railways to the Board of Trade; but, by the Regulation of Railways Act, 1873 (*a*), certain of the powers and duties of the Board of Trade in relation to railways were transferred to a new body called the Railway Commissioners. This process was continued under the Railway and Canal Traffic Act, 1888; and, at the same time, the name of the Commission was changed to that of the Railway and Canal Commission. The last-named body is a court of record, and consists of two Commissioners appointed by the President of the Board of Trade, and of three *ex officio* Commissioners, each of whom must be a judge of a superior court. The Commission has large powers and jurisdiction under various Acts. There is a right of appeal, but only on questions of law, from the Commission to the Court of Appeal.

Under the provisions of the specified Railway Acts, it is made unlawful to open any railway, or portion of a

railway, for the public conveyance of passengers, until one month's notice in writing shall have been given to the Board of Trade of the intention of the company to open the same for traffic; and ten days' notice of the time when the railway will be complete and ready for inspection must also be given to the Board. The Board may postpone the opening of any railway, until satisfied that the public may use the same without danger (a). In execution of its general control of railways, the Board orders every railway company to make returns to it of its capital, traffic, and working expenditure; of the occurrence of any serious railway accidents; and of all tolls and rates from time to time levied (b); and the Board appoints proper persons as inspectors of railways (c). Moreover, every railway company, whether specially called upon to do so or not, must report to the Board of Trade every accident attended with serious personal injury, within forty-eight hours of its occurrence (d); and is required to lay before the Board, for its approbation, certified copies of the by-laws and regulations by which it is governed (e), which by-laws may be either sanctioned or disallowed by the Board at its pleasure. By an important Act of the year 1911, every railway company must send in annual accounts to the Board of Trade in the form required by the statute (f). And the Board may direct the Attorney-General to proceed against any railway company, for non-compliance with the provisions either of its special Act or of any of the general Acts regulative of railways, or for any unlawful act whatsoever (g).

(a) Railway Regulation Acts, 1842, ss. 4, 6; 1873, s. 6. The discretion of the Board is absolute (*A.-G. v. Great Western Railway Company* (1877) 4 Ch. D. 735).

(b) Act of 1871, ss. 9, 10; Act of 1873, s. 4; Act of 1878; Act of 1888, s. 32.

(c) Act of 1871, ss. 3, 4.

(d) *Ibid.* As to investigation by the Board of Trade into the causes of accidents, see ss. 3-8.

(e) Act of 1840, ss. 7, 8.

(f) Railway Companies (Accounts and Returns) Act, 1911.

(g) Act of 1844, ss. 17, 18.

Railway companies, as such, are not bound to act as common carriers (a); the original intention of railway legislation being that private persons should run their carriages on the railways (b). But, in so far as the company holds itself out as a carrier, it is subject to the obligations of a common carrier; and to that extent is bound to carry (c). Under the Railway and Canal Traffic Act, 1854 (d), railway companies are bound to afford reasonable facilities for forwarding and delivering traffic; that is to say, since this Act, companies are bound to carry traffic which they have facilities for carrying, but they can only be compelled to carry it as ordinary bailees and not as common carriers (e).

The Railway Acts contain also provisions authorising the summary apprehension and punishment of engine-drivers, and other servants of the company, guilty of any misconduct (f); and subjecting to punishment all ill-disposed persons obstructing or injuring any railway engine or carriage, or endangering the safety of the passengers (g). And, under the provisions of the general Acts, railway companies, amongst other obligations, are required to maintain and keep in repair good and sufficient fences along their lines; to be responsible for some fires caused by sparks emitted from their engines (h); to transport, at a settled rate, military and police forces and mails; to afford all reasonable facilities for the conveyance of traffic, without any undue preference of particular persons or companies, or of particular descriptions of

(a) See Railway Clauses Act, 1845, ss. 86, 89; *Johnson v. Midland Ry.* (1849) 4 Exch. 367.

(b) See e.g. *Wallis v. L. & S. W. Ry.* (1870) L. R. 5 Ex. 62; *Brown v. G. W. Ry.* (1882) 9 Q. B. D. 744.

(c) *Crouch v. L. & N. W. Ry.* (1854) 14 C. B. 255.

(d) S. 2.

(e) *Dickson v. G. N. Ry.* (1887) 18 Q. B. D. 176.

(f) Act of 1840, ss. 13, 14; Act of 1842, ss. 17, 18.

(g) Malicious Damage Act, 1861, ss. 35–38; Offences Against the Person Act, 1861, ss. 32–34.

(h) Railway Fires Act, 1905 (5 Edw. 7, c. 11).

traffic (a); to permit and facilitate the introduction of electric telegraphs upon their lines; and to pay a duty in respect of passengers carried at fares exceeding one penny a mile (b).

By one of the statutes above mentioned, viz., the Railway Regulation Act, 1844, it was provided, that if, at any time after twenty-one years from the passing of the special Act for any passenger railway established after the year 1844, the average divisible profits for three successive years, upon the paid-up capital stock of such passenger railway company, should be found to equal or exceed ten per cent., the Lords of the Treasury should be at liberty, an Act of Parliament being first obtained for that purpose, to revise and reduce the fares; upon condition of giving the company a guarantee to make good their profits to the amount of ten per cent. during the existence of such reduced scale. Or the Treasury might purchase the railway, whatever might be the rate of divisible profits earned thereon (c). The same Act also required railway companies in general to secure, to the poorer class of travellers, the means of travelling by cheap trains, i.e., at moderate fares, and in carriages protected from the weather (d).

The Companies Clauses Consolidation Act, 1845 (e), as amended by the Mortgage Debentures Acts, 1865 and 1870, contains numerous regulations with regard to railway companies borrowing money on bond or mortgage (f); and provision has been made, by the Railway Companies Act, 1867, with regard to the financial arrangements of insolvent railway companies, as well for the

(a) Railway and Canal Traffic Acts, 1854, s. 2; 1888, s. 28, extending this provision to vessels of, or chartered by, the railway company.

(b) Railway Passenger Duty Act, 1842, s. 4; Cheap Trains Act, 1883, s. 7.

(c) 7 & 8 Vict. c. 85, ss. 1-4.

(d) The fare for third class passengers, by these cheap or government trains, is not to exceed one penny per mile (Cheap Trains Acts, 1858; 1883, s. 3).

(e) Ss. 38-55.

(f) Forms of bond and mortgage deed are in the schedules to the Act of 1845.

protection of their creditors on the one hand, as for the protection of their shareholders on the other (a).

The Regulation of Railways Act, 1868, contains provisions for furthering the safety and comfort of railway travellers, and, among others, an important regulation, that, in every passenger train which travels more than twenty miles without stopping, there shall be provided such sufficient means of communication, between the passengers and the servants of the company in charge of the train, as the Board of Trade shall approve (b).

V. *Conveyances by Water*—that is to say, the carriage of passengers in merchant ships generally, being either steamers or sailing vessels; particular rivers (e.g., the Thames) having their own particular regulations (c). The general law with regard to merchant shipping is contained in the Merchant Shipping Acts, 1894 to 1913.

First, *as to steamers*.—The Merchant Shipping Act, 1894, continuing the like provisions contained in the earlier Acts referred to in the chapter on Navigation (d), provides, that every ‘passenger steamer,’ i.e., any “British or foreign steam-ship carrying passengers to, from, or between, any place or places in the United Kingdom (excepting steam ferry-boats working on chains, commonly called steam bridges)” (e), which shall carry a greater number of passengers than twelve, shall be surveyed by, and reported upon to, the Board of Trade at least once in every year (f); and shall proceed on no voyage with passengers, unless the owner or master has received from the Board a certificate

(a) See *In re Potteries, Shrewsbury, and North Wales Railway Company* (1869) L. R. 5 Ch. App. 67.

(b) Regulation of Railways Act, 1868, s. 22.

(c) 22 & 23 Vict. (1859) c. cxxxiii.

(d) *Post*, ch. x. See also the Chinese Passengers Act, 1855 (18 & 19 Vict. c. 104).

(e) Merchant Shipping Act, 1894, s. 267, amended by the Merchant Shipping Act, 1906, s. 13.

(f) *Ibid*, s. 271.

applicable to the voyage, and showing that the provisions of the Act have been complied with (a). In case the captain or person in charge receives on board any number of passengers greater than the number allowed by the certificate, the owner or master is made liable to pecuniary penalties (b). And the master of every such ship carrying passengers, entering or leaving a port in any pilotage district (whether pilotage is compulsory or not), must, unless he or his mate has a certificate enabling him to conduct the vessel himself, employ a qualified pilot (c). The masters of all foreign-going ships, and of home-trade passenger ships, must have certain certificates of competency or of service; and if she is a foreign-going steamship, then the ship must also have on board one or two certificated engineers according to her size (d).

Secondly, *as to passenger ships generally, otherwise called emigrant ships*.—The Merchant Shipping Act, 1894, after defining an emigrant ship as “every sea-going ship, whether British or foreign, and whether or not conveying mails, carrying more than fifty steerage passengers,” or more such passengers than will allow a certain proportion of the ship’s registered tonnage for each statute adult (e), provides:—that no such ship, unless she be a duly certificated passenger steamer, shall clear out to sea, until duly surveyed and reported seaworthy (f); nor until the master shall have obtained, from the proper authority at the port of clearance, a certificate that the requirements of the Act have been duly complied with, and that the ship is seaworthy, in safe trim, and in all respects fit for her voyage, and her passengers and crew in a fit state to proceed (g); nor until the master shall have joined in a bond to the Crown

(a) Merchant Shipping Act, 1894, s. 271.

(b) *Ibid.* s. 283, and Merchant Shipping Act, 1906, s. 21.

(c) Pilotage Act, 1913, s. 11.

(d) Merchant Shipping Act, 1894, s. 92.

(e) *Ibid.* s. 268.

(f) *Ibid.* s. 289.

(g) *Ibid.* s. 314.

in the sum of 2,000*l.*, or (where neither the owners nor the charterers reside in the United Kingdom) in the sum of 5,000*l.*, conditioned, *inter alia*, for the seaworthiness of the vessel (*a*). The Act contains also a great many provisions for limiting the number, and ensuring the safety and accommodation, health, and welfare, of the passengers (*b*), and for regulating *colonial* voyages (*c*); but, with regard to vessels plying between ports in Australasia, the Governor of the colony from which the vessel proceeds is also authorised to make the proper regulations. Further, it may be observed that, although any British subject who commits an offence on any British ship may be tried in a British court in whose jurisdiction he is found, the laws of the Australian Commonwealth are in force “on all British ships, the King’s ships of war “excepted, whose first port of clearance and whose “port of destination are in the Commonwealth ” (*d*).

The Merchant Shipping Act, 1894, further provides, that the master of every ship bringing steerage passengers into the United Kingdom, from any place out of Europe, and not within the Mediterranean Sea, shall, within twenty-four hours after arrival, deliver to the proper authority a correct list, under his signature, specifying the names, ages, and callings of all the steerage passengers embarked, and the ports from whence they came; and which of them (if any) have died, with the supposed cause of death, or have been born, during the voyage. If the master fails to deliver such list, or it be wilfully false, he incurs a penalty not exceeding 50*l.* (*e*); and if any ship bringing steerage passengers into the United Kingdom from any place out of Europe, and not within the Mediterranean Sea, has on board a greater number of steerage passengers than is

(*a*) Act of 1894, s. 309 and      *tralia* Constitution Act, 1900  
Sched. XIV.; Act of 1906, s. 20.      (63 & 64 Vict. c. 12).

(*b*) Act of 1894, ss. 291–308.

(*e*) Merchant Shipping Act,  
1894, s. 336.

(*c*) *Ibid.* s. 366.

(*d*) Commonwealth of Aus-

allowed by the Act for passengers *from* the United Kingdom, the master is liable to a fine not exceeding 10*l.* for every 'statute adult' constituting such excess (*a*). Further provision is made for the regulation of immigration by the Aliens Act, 1905 (*b*). The general object of this Act is to exclude undesirable immigrants from landing in this country; and to expel undesirable aliens who are in it. Immigrant ships, as defined by the Act, may only land alien steerage passengers at certain ports; and at each of such ports there is an immigration officer and an Immigration Board, for the purpose of administering the Act and hearing the appeals of immigrants from the decisions of immigration officers, under the Act. An immigrant who proves that he is seeking refuge in this country solely to escape religious or political persecution, is not to be excluded solely on the ground of poverty.

(*a*) Merchant Shipping Act, 1894, s. 337. (*b*) 5 Edw. 7, c. 13.



## CHAPTER X.

OF THE LAWS RELATING TO NAVIGATION AND TO THE  
MERCANTILE MARINE.

FOR more than two centuries, British ships have been the subject-matter of special legislation. By an Act of 1854 (*a*), most of the statutes then in force relating to them were repealed; as their provisions had been re-enacted in a consolidated form by the Merchant Shipping Act of that year (*b*). After numerous amending statutes (*c*), the resultant complicated mass of legislation was almost wholly repealed, and re-enacted with amendments in a consolidated form, by the Merchant Shipping Act, 1894 (*d*). This Act is the principal Act relating to merchant shipping now in force. It originally contained 748 sections, and was divided into fourteen parts, each of which parts dealt with a special branch of the law relating to British ships (*e*). This Act has, since 1894, been largely amended by several Merchant Shipping Acts (*f*); of which the most important are the Merchant Shipping Act, 1906, the Maritime Conventions Act, 1911, and the Pilotage Act, 1913 (*f*).

(*a*) 17 & 18 Vict. c. 120.

(*b*) *Ibid.* c. 104.

(*c*) M. S. Acts, 1855, 1862, 1867, 1871, 1872, 1873, 1876, 1880, 1882, 1883, 1887, 1888, 1889, 1890, 1892.

(*d*) 57 & 58 Vict. c. 60.

(*e*) Throughout this chapter 'M. S. A.' is used in the notes as an abbreviation of 'Merchant Shipping Act.'

(*f*) M. S. A., 1897 (60 & 61

S.C.—III.

Vict. c. 59), as to powers of detention for unsafety due to undermanning; M. S. A., 1898 (61 & 62 Vict. c. 14), extending the right to limit liability to cases of vessels when launched until registration; M. S. A., 1898 (61 & 62 Vict. c. 44), abolishing the Mercantile Marine Fund and constituting the General Light-house Fund, and altering the mode of collection of light dues;

In attempting to make a concise statement of the laws relating to navigation and merchant shipping, we shall distribute our statement under the following heads:—  
 I. The Laws relating to Navigation; II. The Laws relating to the Ownership, Registration, and Transfer of British Ships; III. The Laws relating to Mortgages of British Ships; IV. The Laws relating to Merchant Seamen; V. The Law relating to Pilotage; VI. The Laws relating to the Liability of Shipowners and Others for Loss or Damage; and VII. The Laws relating to Lighthouses.

I. *The Laws relating to Navigation.*—Before the repeal of the Navigation Acts (a), about the middle of the nineteenth century, the policy of the legislature was to encourage the building and employment of British ships and the manning of them by British seamen, by excluding foreign ships from the trade of carrying goods or passengers between places in the United Kingdom, or between the United Kingdom and British colonies or

M. S. A., 1900 (63 & 64 Vict. c. 32), extending the right to limit liability, and granting it to dock and harbour authorities; M. S. A., 1906 (6 Edw. 7, c. 48), dealing with the safety of British and also foreign ships, and with passenger and emigrant ships, food, repatriation, wages, and voting of seamen, limitation of liability, and other matters; M. S. A., 1907 (7 Edw. 7, c. 52), respecting tonnage for purposes of limitation; M. S. (Seamen's Allotment) Act, 1911 (1 & 2 Geo. 5, c. 8), as to payment of allotment notes; M. S. (Stevardores and Trimmers) Act, 1911 (c. 41), giving rights to proceed *in rem* or procure arrest of ship; M. S. A., 1911 (c. 42), power of

British Courts in foreign countries to forfeit vessels; Maritime Conventions Act, 1911 (c. 57), altering the law as to division of loss, presumption of fault, procedure in claims for loss of life or personal injury, life salvage, limitation of time in some damage and salvage actions; and Pilotage Act, 1913 (2 & 3 Geo. 5, c. 31), as to a revision of pilotage organization, powers of Board of Trade and of pilotage authorities, compulsory pilotage, and rights and liabilities of pilots.

(a) Navigation Act, 1660 (12 Car. 2, c. 18); 6 Geo. 4 (1825), c. 105; 3 & 4 Will. 4 (1833), cc. 54, 55, and 59; 8 & 9 Vict. (1845) cc. 88, 89, and 93.

possessions, or between any parts of the British possessions in Asia, Africa, or America. Under the influence, however, of the doctrines which brought about the policy of 'free trade,' a new course of legislation was commenced in 1849 (*a*), removing these prohibitions; and gradually foreign ships have been freely admitted to share with British ships the carrying trade, both coasting and oversea, from which they were formerly excluded.

The laws relating to the navigation of ships refer therefore, since the repeal of the Navigation Acts, mainly to the provisions made to secure the safety of ships, and of seamen, passengers, and goods. The subject is dealt with in Part V. of the Merchant Shipping Act, 1894, as amended in 1906 (*b*). In pursuance of powers given by the Act (*c*), Regulations have been made by Order in Council (*d*) for preventing collisions at sea between ships. The Regulations must be complied with by British ships everywhere, and by foreign ships when within British jurisdiction, or when outside the jurisdiction, if the ships belong to the subjects of foreign governments with whose consent the Regulations have been applied by Order in Council. Most foreign governments (*e*) have consented to, or made provision for, the application of the Regulations to their own ships; and thus the Collision Regulations have acquired an international character. They prescribe the lights to be carried by ships at night,

(*a*) 12 & 13 Vict. c. 29; Customs Consolidation Act, 1853 (16 & 17 Vict. c. 107); 17 & 18 Vict. (1854) c. 5; 18 & 19 Vict. (1855) c. 96; Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36); M. S. A., 1894, s. 736, and M. S. A., 1906, ss. 1-12.

(*b*) M. S. A., 1894, ss. 418-463.

(*c*) *Ibid.* s. 418.

(*d*) Order in Council, 13 Oct.,

1910.

(*e*) *Viz.* Argentina, Austria-Hungary, Belgium, Brazil, Bulgaria, Chile, China, Costa Rica, Denmark, Ecuador, Egypt, France, Germany, Greece, Guatemala, Italy, Japan, Mexico, Netherlands, Norway, Peru, Portugal, Roumania, Russia, Siam, Spain, Sweden, Turkey, United States, Venezuela.

the signals to be made in fog, or thick weather, the 'rules of the road' to be observed by vessels approaching each other in such a way as to cause risk of collision, and the measures to be taken to avoid collision. It is a misdemeanor, punishable by fine or imprisonment, for an owner or master of a ship wilfully to infringe any of the Regulations; and if any damage to person or property arises from the non-observance of any of the Regulations, it is deemed to have been occasioned by the wilful default of the person in charge of the deck of the ship at the time, unless it is shown to the satisfaction of the Court that the circumstances of the case made a departure from the Regulations necessary (a). Until 1911 (b), where in a collision action it was proved that a vessel had infringed any of the Regulations, the Court was bound to hold that she was to blame; unless it was also found that the infringement was necessary, or that it could by no possibility have contributed to the collision (c). This rule is now abrogated; but proof of a departure from the Regulations is still cogent *prima facie* evidence of negligence in the navigation of the vessel which does so infringe the Regulations. In every case of collision, it is the duty of the person in charge of each ship, if he can do so without danger, to stand by the other vessel and render assistance to her if necessary, and also to give the name of his own ship, the port to which she belongs, and the ports from and to which she is bound (d); and the master or person in charge of any vessel is always bound to render to any person whomsoever (even to an alien enemy), who may be found in danger of being lost at sea, such assistance as may be possible without serious danger to his own vessel, her crew, or passengers (e). A breach

(a) M. S. A., 1894, s. 419 (3).

(b) Maritime Conventions Act, 1911, s. 4 (1).

(c) M. S. A., 1894, s. 419 (4);  
*The Aristocrat* [1908] F. 9.

(d) M. S. A., 1894, s. 422 (1), (3); Maritime Conventions Act, 1911, s. 4 (2).

(e) Maritime Conventions Act, 1911, s. 6 (1).

of these duties amounts to a misdemeanor ; and if the offender holds a Board of Trade certificate of competency, an inquiry into his conduct may be held, and his certificate may be cancelled or suspended (a).

II. *The Laws relating to the Ownership, Registration, and Transfer of British Ships.*—The only persons who are qualified to own, in whole or part, a British ship, are natural-born or naturalized British subjects, or persons made denizens, or corporate bodies established under the laws of some part of His Majesty's dominions, and having their principal place of business (*i.e. prima facie* the registered office) in those dominions (b). Thus, an alien is not qualified to hold any legal or beneficial interest in a British ship ; but a company is so qualified, if formed under the Companies Acts, and having its registered office in the British dominions, although the directors and shareholders are aliens. Every British ship, with the exception of certain small vessels chiefly employed on the coasts, must be registered (c). For the purpose of the register, the legal estate in a ship is divided into sixty-four shares ; and there may not be more than five registered joint-owners of any one share (d). Before registry, the ship must be surveyed in order to ascertain her tonnage, and to obtain particulars descriptive of her identity (e). A person applying to be registered as owner of the ship, or of one or more shares in her, must sign a declaration stating his qualification to own a British ship, and that to the best of his knowledge no unqualified person or corporation is entitled as owner to any legal or beneficial interest in any share in her (f). On registration, the particulars entered in the register book are, the name of the ship, the port to which she belongs (which is the

(a) M. S. A., 1894, s. 422 (3) ;  
M. C. A., 1911, s. 6 (1).  
(b) M. S. A., 1894, s. 1.  
(c) *Ibid.* ss. 2, 373.  
(d) *Ibid.* s. 5.  
(e) *Ibid.* s. 6.  
(f) *Ibid.* s. 9.

port at which she is registered), the particulars of her tonnage and identity comprised in the certificate of survey, and the name of her registered owner, or, if there are more owners than one, their names and the proportions in which they are interested in her (*a*). When these requirements are carried out, a certificate of registry is granted, containing the particulars of the ship and the name of her master (*b*); and this certificate forms part of the ship's papers, and is carried by the ship as evidence of her identity and her right to be recognised as a British ship. When there is any doubt as to the title of any ship, registered as a British ship, to be so registered, the Commissioners of Customs may require evidence of the title to be given; and, if satisfactory evidence is not given, the ship is subject to forfeiture to the Crown (*c*). If an alien acquires any legal or beneficial interest in a ship using the British flag and assuming the British character, his interest is liable to forfeiture; and the ship may be seized and brought before a British Court for adjudication (*d*). When an unqualified person has acquired an interest by transmission, or death, or marriage, he may, in order to avoid forfeiture, apply to the Court for an order for the sale of his interest and payment to him of the proceeds (*e*). The register is then closed; and the certificate of registry, if in existence, must be given up, in the event of the ship being lost or transferred to any unqualified person (*f*).

The property in a British ship, or share therein, unless it is transmitted by operation of law, as, for example, on the death or bankruptcy of the owner, must be transferred by bill of sale. The bill of sale (which must not be confused with a bill of sale under the Bills of Sale Acts, which do not apply to ships (*g*)) must be in the form

(*a*) M. S. A., 1894, s. 11.

Geo. 5, c. 42), s. 1 (1).

(*b*) *Ibid.* s. 14.

(*e*) M. S. A., 1894, s. 28.

(*c*) M. S. A., 1906, s. 51 (2).

(*f*) *Ibid.* s. 21; M. S. A., 1906,

(*d*) M. S. A., 1894, ss. 69, 71, s. 52 (1).

and 76; M. S. A., 1911 (1 & 2

(*g*) Bills of Sale Act, 1878, s. 4

prescribed by the Merchant Shipping Act (*a*). On producing the bill of sale to the registrar, the transferee is entitled to be put on the register as owner of the number of shares specified therein, after he has made the statutory declaration of his qualification to own such interest, and of his belief that no unqualified person is interested in the ship (*b*).

There may be equitable interests in a British ship or share arising under contract or otherwise. But such interests may be of any extent, and are not regulated by statute as are legal interests; and, although they may not be entered in the register book, they may be enforced against the registered owner in the same ways as in the case of any other personal property (*c*). The register is not conclusive evidence of ownership; and the Court is entitled to go behind the register and to ascertain the true facts. The person named in the register as owner may be both the legal and the beneficial owner, or he may be merely a trustee for others whose names are not on the register (*d*); or he may be a mortgagee who has taken a bill of sale from the true owner, to secure the payment of a debt, and has registered the bill of sale (*e*). A beneficial owner is as much liable to pecuniary penalties imposed on owners of ships, if any should be incurred, as is a registered owner (*f*).

The name and address of the managing owner must be registered (*g*). When a ship is owned by numerous persons, the management of her is generally delegated to a manager, who need not be himself one of the co-owners. Contracts made by him within the scope of his authority bind those whose agent he is, but nobody else.

(*a*) M. S. A., 1894, ss. 24, 65.

(*b*) *Ibid.* ss. 24–26.

(*c*) *Ibid.* ss. 56 and 57.

(*d*) *The Spirit of the Ocean* (1865) 34 L. J. Ad. 74; 12 L. T. 239; *The Two Ellens* (1871) L. R. 3 A. & E. 345.

(*e*) *The Innisfallen* (1866) L. R. 1 A. & E. 72; *Frazer v. Cuthbertson* (1880) 6 Q. B. D. 93;

*Von Freeden v. Hull* (1907) 96 L. T. 590.

(*f*) M. S. A., 1894, ss. 58, 71.

(*g*) *Ibid.* s. 59.

Co-owners of a ship are not of necessity partners; although circumstances may show that they have become so, at least temporarily. The registration of a person as owner does not of itself make him liable for the ship's debts. He may escape liability by showing that he was not, in fact, the owner, or the person on whose behalf the ship was being employed (*a*). If he is the true owner, he will be liable for the ship's debts, unless he has expressly withdrawn the manager's authority to contract on his behalf; and the most effective way in which he can protect himself is by bringing an action of restraint in the Admiralty Court, to compel the other co-owners, before sending the ship to sea, to give security to the amount of his interest in the ship for her safe return from her contemplated voyage. After obtaining such security, he cannot share in the profits of the voyage, and is not liable to contribute to its expenses. A person, however, though his name be not on the register, may be liable for the ship's debts, on the ground that the manager had, in fact, authority to employ the ship on his behalf and for his benefit (*b*).

In order that a ship owned by several persons may not lie idle owing to disagreement amongst the co-owners as to the mode of her employment, the Admiralty Court will rarely hesitate to give possession of her to the owners of the majority of shares in her, on their giving security to the minority to the amount of their interest in the ship (*c*); but it may order the ship to be sold for the benefit of all, preferring however to give to the majority power to purchase at the appraised value (*d*).

III. *The Laws relating to Mortgages of British Ships.*—  
A ship or any share may be mortgaged to secure the

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| ( <i>a</i> ) <i>Frazer v. Cuthbertson</i>      | ( <i>d</i> ) Admiralty Court Act, 1861, |
| (1880) 6 Q. B. D. 93.                          | s. 8; <i>The Nelly Schneider</i> (1878) |
| ( <i>b</i> ) <i>Von Freeden v. Hull</i> (1907) | 3 P. D. 152; <i>The Marion</i> (1884)   |
| 96 L. T. 590.                                  | 10 P. D. 4; <i>The Hereward</i> [1895]  |
| ( <i>c</i> ) <i>The Kent</i> (1862) Lush. 495; | P. 284.                                 |
| <i>The Talca</i> (1880) 5 P. D. 169.           |   |



payment of a debt or of any sum due, on an account current. The mortgage may be legal or equitable. A legal mortgage of a registered ship is created by a deed in the form prescribed by the Merchant Shipping Act; and, to protect the mortgagee fully, must be registered in the register book (a). If there are two or more mortgages in respect of the same ship, the mortgage which has been first registered takes priority, although later in date of creation, and notwithstanding any notice of any earlier mortgage (b). A shipowner is not, on executing a mortgage, deemed to cease to be owner of the ship (c). He probably will remain in possession, and employ the ship for his own benefit in any way he thinks fit.

The rights and remedies of a registered mortgagee are as follows :—

(1) He may, by legal proceedings, or by taking possession of the ship, restrain the mortgagor from so using the ship as materially to impair the value of the security (d).

(2) He may, after default under the mortgage by the mortgagor, take possession of the ship and collect the freight which she is in course of earning, or which, if already earned, has not been paid to the mortgagor (e). He must, however, allow her to fulfil all engagements entered into by the mortgagor whilst in possession; unless they are such as may materially impair the security of the mortgage (f).

(3) He may sell the ship, under his statutory power of sale (g).

(a) M. S. A., 1894, s. 31; *Shillito v. Biggart* [1903] 1 K. B. 683.  
Sch. I, Forms A. and B.

(b) *Ibid.* s. 33.

(c) *Ibid.* s. 34.

(d) *Law Guarantee Society v. Russian Bank* [1905] 1 K. B. 815; *The Manor* [1907] P. 339.

(e) *Rusden v. Pope* (1868) L. R. 3 Ex. 269; *Keith v. Burrows* (1877) L. R. 2 App. Ca. 636;

(f) *Collins v. Lamport* (1865)

34 L. J. Ch. 196; 11 L. T. 497;

*The Cathcart* (1867) L. R. 1 A. &

E. 314; *Cory v. Stewart* (1885)

2 T. L. R. 508; *The Heather Bell*

[1901] P. 272.

(g) M. S. A., 1894, s. 35.

(4) He may enforce payment of the mortgage debt by arresting the ship in an action *in rem* in the Admiralty Court, obtaining judgment for the amount due under the mortgage and costs, and enforcing the judgment by sale of the ship under an order of the Court and payment to himself out of the proceeds (a).

(5) He may bring a common law action against the mortgagor on the covenant to pay contained in the mortgage deed.

(6) He may intervene in any action *in rem* brought against the ship in the Admiralty Court, provide bail to release her from arrest, set up any defences to the claim which are open to the mortgagor, and ask for any order that may be necessary to protect his security against any claims over which his mortgage may take priority (b).

(7) He may transfer the mortgage; and the transferee may be registered as the mortgagee (c).

A registered mortgagee's rights under the mortgage are not affected by any act of bankruptcy committed by the mortgagor after the registration of the mortgage; and he has priority over any claim of the trustee in bankruptcy, even if the ship was, at the commencement of the bankruptcy, in the possession or reputed ownership of the mortgagor (d).

IV. *The Laws relating to Merchant Seamen*.—These are mainly contained in Part II. of the Merchant Shipping Act, 1894 (e), as amended by the Merchant Shipping Act, 1906. They deal with most matters affecting the interests of seamen as such, *e.g.* their engagement, food, accommodation, health, discipline, discharge, wages, relief from distress when left abroad, and protection from imposition. The term 'seaman' includes every person (except masters, pilots, and apprentices) employed

(a) Admiralty Court Act, 1861, I, Form C.

s. 11.

(b) Ord. XII. r. 24.

(c) M. S. A., 1894, s. 37; Sch.

(d) M. S. A., 1894, s. 36; *The Ruby* (1900) 83 L. T. 438.

(e) M. S. A., ss. 92-266.

or engaged in any capacity on board any ship that goes to sea ; and the term ‘master’ includes every person (except a pilot) who has command of a ship (a).

Agreements for service with the crew of a ship must, as a general rule, be made in writing (b), in a form approved by the Board of Trade ; and are usually called the ‘ship’s articles.’ They must contain, amongst other particulars :—(1) a description of the nature and probable duration of the intended voyage, or the maximum period of the engagement, and the parts of the world to which the voyage is not to extend ; (2) the amount of wages which each seaman is to receive and the capacity in which he is to serve ; and (3) any regulations, approved by the Board of Trade and agreed to by the parties, as to conduct on board, and fines or other lawful punishment for misconduct (c). In the case of foreign-going ships, the agreement with the crew must be signed by each seaman in the presence of a superintendent of the local mercantile marine office (d). When his engagement terminates, the seaman must receive a proper discharge and payment of his wages, and also be furnished with a proper account in a form approved by the Board of Trade, showing the amount of the wages earned, and all deductions made in respect of fines or forfeitures for misconduct (e). If discharged from a British ship, or left ashore at a foreign port, he is entitled to be provided with a passage home (f).

. . . A seaman has a *maritime lien* (g) on the ship and freight for wages, and any other sums made by statute recoverable by him as wages ; and, by virtue of his lien, he has priority over most other creditors of the shipowner. For the recovery of wages he has the following remedies :—(1.) if the wages claimed do not exceed 50*l.*, he can recover

(a) M. S. A., 1894, s. 742.

(b) *Ibid.* s. 113.

(c) *Ibid.* s. 114 ; and, for the statutory scale of provisions, see M. S. A., 1906, s. 25 and Sch. I.

(d) M. S. A., 1894, s. 115.

(e) *Ibid.* ss. 132, 133.

(f) M. S. A., 1906, ss. 28–49.

(g) See *post*, Bk. V, ch. xv. (p. 658).

them by order of a court of summary jurisdiction (a); (2.) if they do not exceed 100*l.*, he can recover them in a common law action brought in a county court (b); (3.) if they exceed 50*l.* but do not exceed 150*l.*, he may bring an action *in rem* against the ship in a county court having Admiralty jurisdiction (c); (4.) if they exceed 50*l.*, he can recover them by action brought in the High Court against the shipowner, or by proceedings *in rem* against the ship in the Admiralty Division (d); (5.) if they do not exceed 50*l.*, he can sue *in rem* in the High Court or in a county court, when the shipowner has been adjudged bankrupt, or the ship is already under the arrest of the court (e). In Admiralty actions, costs are now in the discretion of the Court, whatever the amount of the sum recovered (f).

The master also of a ship has a *maritime lien* for his wages, and for disbursements properly made by him on the ship's account and on the owner's credit (g), and can recover them by means of an Admiralty action *in rem* (h).

In respect of personal injury in the service of the ship, or illness, a master or seaman has the following rights or remedies:—(1.) the expense of medical attendance and treatment, and of maintaining him until he is cured, or dies, or is returned to a proper return port, and of conveying him there, must be defrayed by the shipowner without any deduction from his wages (i); (2.) at common law, he is entitled to recover damages if the injury was caused by the shipowner's negligence, or by a breach of

(a) M. S. A., 1894, s. 164.

(b) County Courts Act, 1903, s. 3.

(c) County Courts (Admiralty Jurisdiction) Act, 1868, s. 3 (2).

(d) Admiralty Court Act, 1861, s. 10; M. S. A., 1894, s. 165.

(e) M. S. A., 1894, s. 165.

(f) S. 9 of the County Courts (Admiralty Jurisdiction) Act,

1868, is repealed by the Statute Law Revision Act, 1893. See also Ord. LXV., r. 1.

(g) *The Ripon City* [1897] P. 226.

(h) Admiralty Court Act, 1861, s. 10; M. S. A., 1894, s. 167; 1906, s. 57.

(i) M. S. A., 1906, ss. 34 and 35.

his statutory duty to use all reasonable means to secure that the ship was in a seaworthy condition (a) ; but he cannot recover damages if the injury was caused by the negligence of any other member of the crew or fellow-servant in a common employment with him, or was contributed to by his own negligence (it may be pointed out here that the 'Employers' Liability Act, 1880, does not apply to masters of ships or to seamen) (b) ; (3.) if the injury is one for which the shipowners are probably liable to pay damages at common law, the ship may be detained within the jurisdiction until the claim is satisfied or security for it is given, provided the injury has been sustained on or about the ship in any port of the United Kingdom, and that none of the owners reside therein (c) ; (4.) for any personal injury by accident, arising out of and in the course of his employment, a master or seaman is entitled to recover compensation under the Workmen's Compensation Act, 1906 (d), provided he is a workman as defined in the Act, and is a member of the crew of a ship registered in the United Kingdom, or of any other British ship whose owner or manager resides, or has his principal place of business, therein (e). The weekly payment, however, is not payable under the Act in respect of the period during which the shipowner is liable to defray the expenses of maintenance. The ship may be detained in England until the compensation due under the Act is paid, or security is given for it, if none of her owners reside in the United Kingdom (f) ; (5.) he may bring an action *in rem* or *in personam* in any competent court having Admiralty jurisdiction in cases of damage (g).

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| (a) M. S. A., 1894, s. 458 ;            | (Remedies) Act, 1905.                      |
| <i>Hedley v. Pinkney</i> [1894] A. C.   | (d) 6 Edw. 7, c. 58, s. 7.                 |
| 222.                                    | (e) <i>Schwartz v. India, &amp;c., Co.</i> |
| (b) 43 & 44 Vict. c. 42, s. 8 ;         | [1912] 2 K. B. 299.                        |
| <i>Corbett v. Pearce</i> [1904] 2 K. B. | (f) 6 Edw. 7, c. 58, s. 11.                |
| 422.                                    | (g) Maritime Conventions Act,              |
| (c) Shipowners' Negligence              | 1911, s. 5.                                |

V. *The Law relating to Pilotage*.—The law relating to pilotage is at present in a transitional stage, owing to the passing of the Pilotage Act, 1913 (*a*), to which it has not yet been possible to give full effect. Pilotage matters are regulated by the Pilotage Act, supplemented by (1.) by-laws and regulations (made by the various pilotage authorities existing before 1913) continued in force by the Pilotage Act (*b*); (2.) the provisions of Part X. of the Merchant Shipping Act, 1894, and of various local Acts, giving powers to pilotage authorities in their various districts, and continued in force by the Pilotage Act; (3.) such by-laws as may be made by pilotage authorities after the passing of the Pilotage Act; and (4.) Pilotage Orders made by the Board of Trade under the Act (*c*).

Temporarily, therefore, the position is one of some complexity; but the Act seems to contemplate a practical reorganisation of pilotage authorities, and the complete abolition of the defence of compulsory pilotage (*d*), but, probably, also the extension of compulsion, and a greater uniformity of local regulations.

The organisation of pilotage authorities, and administration of the general pilotage law is now controlled by the Board of Trade (*e*), as also will be the regulations as to compulsion (*f*). The local administration of pilotage matters will continue to rest with pilotage authorities (*g*). A pilotage authority will regulate the examination appointment, employment, remuneration, conduct, suspension, and control of pilots for its own district (*h*). There are at present more than sixty such authorities in the United Kingdom; and of these the London Trinity

(*a*) 2 & 3 Geo. 5, c. 31 (1 April, 1913). in all probability be made within a year or two).

(*b*) *Ibid.* ss. 8, 59, 60.

(*e*) *Ibid.* Pt. I. and s. 7.

(*c*) *Ibid.* ss. 1, 7.

(*f*) *Ibid.* s. 7 (*h*).

(*d*) *Ibid.* s. 15 (in order to give effect to the International Convention on Pilotage which will

(*g*) *Ibid.* ss. 8, 17.

(*h*) *Ibid.* ss. 17, 26.

House (a) having jurisdiction in the Thames, the English Channel, and in forty districts called 'outport districts' where no special provision has been made to constitute a local pilotage authority, is the most important.

So far as they are not inconsistent with the terms of the Pilotage Act (b), existing rules and regulations as to pilotage are continued in force in the district to which they applied (c), whether such rules and regulations were made by by-law or by statute; and it may be convenient to explain briefly the status of a pilot, and the present rules as to compulsory pilotage.

A pilot means any person 'not belonging to a ship who has the conduct thereof' (d), and is licensed by a pilotage authority to conduct the navigation of ships within the district of that authority (e), or as a deep-sea pilot (f). It is an offence, punishable by fine, for an unqualified pilot (i.e. a pilot not qualified by his license) to act as pilot on a ship, except when no qualified pilot has offered to pilot the ship; or for the master of a ship knowingly to employ or to continue to employ an unlicensed pilot when a licensed pilot has offered his services (g). A pilot acting beyond the limits for which he is licensed is there an unqualified pilot. A pilot is entitled to remuneration for his services at fixed rates (h); and it is an offence, punishable by fine, for him to demand, or for a master to offer, any greater or less sum (i). The master or mate of a vessel navigating in a pilotage district may himself be a pilot holding a pilotage certificate for that district (k);

(a) Or 'Brethren of the Guild, Fraternity, or Brotherhood of the most glorious and undivided Trinity, and of St. Clement in the Parish of Deptford Strond in the County of Kent.'

(b) S. 11 (1) of the Pilotage Act, 1913, usually will operate in the case of passenger vessels.

(c) Pilotage Act, 1913, s. 59.

(d) M. S. A., 1894, s. 742.

*Semble*, pilotage certificates will not now be granted to aliens (Pilotage Act, 1913, ss. 23, 24).

(e) Pilotage Act, 1913, s. 16.

(f) *Ibid.* ss. 7 (1) (i), 17 (1) (n).

(g) *Ibid.* s. 30.

(h) *Ibid.* s. 17 (1) (f); s. 49.

(i) *Ibid.* s. 50.

(k) *Ibid.* ss. 11, 17, 23, 24.

so that a licensed pilot need not be taken on board that ship in that area. The Workmen's Compensation Act, 1906, applies to pilots when employed on ships; as if a pilot was a seaman and a member of the crew (a). A pilot, therefore, employed on any ship registered in the United Kingdom, or on any British vessel whose owner or manager resides, or has his principal place of business, in the United Kingdom, is entitled to recover from the shipowner compensation for any personal injury by accident arising out of and in the course of his employment as a pilot on such ship. If none of the owners reside in the United Kingdom, the ship may be detained until compensation has been paid or security given to abide the event of proceedings instituted to recover compensation (b).

With regard to compulsory pilotage, in some cases vessels are required to take a pilot by law; in a much larger number of cases the owner or master is free to take a pilot or not to do so. Pilotage is said to be compulsory when, by reason of some valid regulation, statutory or local, there is a liability to pay pilotage rates whether a pilot is employed or not, or a penalty is imposed on the owner or master if he fails to take a pilot (c). In such cases by statute (d), and probably at common law (on the ground that a pilot in such circumstances is not the servant of the owner (e)), the shipowner is not liable for any loss or damage caused solely by the negligence of a qualified pilot compulsorily in charge (f). But this defence is now only available if the compulsion to take a pilot in fact existed in similar cases before the passing of the Pilotage Act, 1913 (g); nor will it be available in any case as a defence after December 31, 1917 (or such earlier date as may be fixed by Order in Council to give effect to an international convention on the subject of

(a) 6 Edw. 7, c. 58, s. 7 (3).

(d) M. S. A., 1894, s. 633.

(b) Workmen's Compensation Act, 1906, s. 11.

(e) *The Halley* (1868) L. R. 2 P. C., p. 201.

(c) *The Johann Sverdrup* (1886) 12 P. D., p. 45; *The Ruby* (1890) 15 P. D. 164.

(f) *The Calabar* (1868) L. R. 2 P. C. 238.

(g) Pilotage Act, 1913, s. 14.



pilotage (a). The defence of compulsory pilotage therefore only exists where it could have been raised before the passing of the Pilotage Act, 1913; and it will cease in all cases before 1918. The effect will be, to assimilate the English law to that of some other countries (b), *viz.* that compulsion may exist, but only so as to put the pilot in the position of an adviser or servant, rather than that of a controller (c).

The Pilotage Act, 1913, makes pilotage compulsory in all cases where passengers are carried by a ship, in any pilotage district, for the purpose of entering, leaving or making use of a port therein (d). Subject to this provision, pilotage continues to be compulsory in all districts wherein it was previously compulsory, and continues to be not compulsory where it was previously not compulsory (e); so that all local exemptions previously in force remain so. The Board of Trade (but not now a pilotage authority) may extend or reduce by a Pilotage Order the cases of compulsion (f); but not so as to extend the right to rely on compulsion as a defence in cases where there was previously no compulsion (g). Under the existing regulations, but with very wide exemptions, pilotage is compulsory in the Bristol, Hull, Liverpool, London and Outport, and Swansea, districts; while it is not compulsory at Cardiff and Newcastle, or in the English Channel (h). The policy of the Pilotage Act, 1913, is clearly that, in the near future, the question whether pilotage is compulsory or not in any given district for any particular vessel shall be decided by reference to Pilotage Orders made under the Act.

VI. *The Laws relating to the Liability of Shipowners and Others.*—At common law, the liability of a shipowner

(a) Pilotage Act, 1913, s. 15 (1), subject to a few unimportant exemptions.  
(2).

(b) That being the object of the proposed convention. (e) *Ibid.* s. 10.  
(f) *Ibid.* s. 7 (1) (h).

(c) *The Dallington* [1903] P. 77. (g) *Ibid.* s. 14.

(d) Pilotage Act, 1913, s. 11 as important and typical.

for damage done by his ship was unlimited. In 1734, an Act was passed limiting, to the value of the ship and the freight she was earning, the shipowner's liability for loss of cargo by theft of the master or crew (*a*); and similar relief was afterwards given in cases of loss by fire, and of theft by persons other than the crew (*b*). In 1813, the liability of owners of British ships for damage by collision was similarly limited (*c*); and in 1854 the legislature extended the limitation to foreign ships and to cases of loss of life and personal injury (*d*), with a provision that in such cases the value of the ship should be taken to be not less than 15*l.* per ton of the ship's tonnage. To avoid disputes as to the value of ship and freight, and to deprive vessels of little value of any advantage over well-found ships, the Merchant Shipping Act, 1862 (*e*), fixed a rough average value for all ships for the purposes of limitation of liability at 15*l.* per ton in cases of loss of life or personal injury, and 8*l.* per ton in cases of damage without loss of life or personal injury. This provision was repealed, but in substance re-enacted, by the Merchant Shipping Act, 1894 (*f*); and the principle of limitation of liability has since been further extended by the Merchant Shipping (Liability of Shipowners) Act, 1898 (*g*), to the owners or builders of any ship built at any place in His Majesty's dominions, from the time of her launching until her registration, and, by the Merchant Shipping (Liability of Shipowners and Others) Act, 1900 (*h*), to the owners of any dock, canal, or harbour, for any damage to any vessel or any thing on board any vessel (but not for loss of life or personal injury). These enactments have been still further extended by the Merchant Shipping Act, 1906 (*i*), to protect any charterer, to whom a ship is

(*a*) 7 Geo. 2, c. 15.

(*b*) 26 Geo. 3, c. 86.

(*c*) 53 Geo. 3, c. 159.

(*d*) M. S. A. 1854, s. 503.

(*e*) 25 & 26 Vict. c. 63, s. 54.

(*f*) M. S. A. 1894, s. 503.

(*g*) 61 & 62 Vict. c. 14;  
M. S. A. 1906, s. 70.

(*h*) 63 & 64 Vict. c. 32.

(*i*) 6 Edw. 7, c. 48, ss. 69, 70,  
71, which, in effect, declared the  
existing law as to this point

demised, from unlimited liability for injury or damage caused by the master or crew, who become, during the operation of the charterparty, his servants and not the servants of the shipowner. The privilege of limitation extends to all collision-damage cases, whether in Admiralty or elsewhere, and to all ships, whatever their nationality (*a*), and to beneficial owners as well as to registered owners.

The law relating to limitation of liability may be summarised as follows. For loss of life or personal injury caused to any person on board the ship in fault, or any other vessel, the owner of the ship, whether British or foreign, is not liable in damages beyond an amount representing 15*l.* a ton for each ton of the ship's tonnage, and for any loss of, or damage to, any goods or property of any kind on land or on water, he is not liable beyond an amount representing 8*l.* a ton (*b*); provided the loss of life, personal injury, or damage, has taken place without the actual fault or privity of the shipowner (*c*). The limitation may be claimed by instituting proceedings for limitation of liability in the Admiralty Division, after liability has been admitted by the shipowner or determined by the Court, or it may be claimed by way of defence or counterclaim in a damage action; but the latter course is seldom taken when liability is disputed (*d*). The ordinary mode of obtaining limitation of liability is for the shipowner to bring an action calling upon all persons who have claims against him for damages to appear, and to ask for a decree limiting his liability to the statutory amount, which he must pay into court with interest from the date of the damage. In addition to the

(*The Hopper* No. 66 [1908] A. C. 126).

(*a*) *Chartered, &c. Bank v. Netherlands, &c. Co.* (1883) 10 Q. B. D. 521.

(*b*) The calculation of tonnage is governed by M. S. A. 1894, ss. 77-87, and 1906, ss. 54, 55. The ship's register is not con-

clusive.

(*c*) M. S. A. 1894, s. 503; M. S. A. 1900, s. 1; *Asiatic Petroleum Co. v. Lennard's Carrying Co.* (1913) 29 T. L. R. 739.

(*d*) *The Clutha* (1876) 45 L. J. (Ad.) 108; 35 L. T. 36.

statutory amount paid into court, he is liable in full for the costs of the limitation action, and also for the costs of proceedings properly brought by the claimants to recover their claims.

The owner of a British ship is not liable at all for any loss or damage happening, without his actual fault or privity, to any goods on board his ship, by reason of fire on board the ship, or for the loss of any gold, silver, diamonds, watches, jewels or precious stones on board his ship, by reason of robbery or embezzlement; where the true nature and value of the goods have not, at the time of shipment, been declared in the bills of lading or in writing, by the owner or shipper (a).

It may be here observed, that there is no enactment (b) preventing a shipowner from contracting with the owners of goods carried in his ship, that he shall not be liable for any loss or damage to the goods caused during transit by any perils expressly excepted in the contract of carriage. Consequently, it is the general practice of shipowners to insert in their contracts of carriage an exceptions clause, exempting them from any liability for loss or damage caused by perils specified in the clause. The clause may be, and often is, so framed as to exempt the shipowner from liability to the cargo owners for damage caused by the negligence of the shipowner's servants, and is sometimes so wide in its terms as to protect him from liability for the breach of his primary duty to provide a ship that is reasonably fit in all respects, at the commencement of the voyage, to carry safely the goods which he has undertaken to carry. The Courts give effect to such a clause; but only where its terms are so clearly expressed as to be free from ambiguity (c).

(a) M. S. A. 1894, s. 502; *The Diamond* [1906] P. 282.

(b) As there is in the United States (the 'Harter' Act, 1893), Australia (Sea Carriage of Goods Act, 1904), New Zealand (Ship-

ping and Seamen Act, 1908, s. 300).

(c) See *The Carron Park* (1890) 15 P. D. 203; *Baerselman v. Bailey* [1895] 2 Q. B. 301; *Steel v. State Line* (1877) L. R. 3 App.

VII. *The Laws relating to Lighthouses, Buoys, and Beacons.*—These are contained in Part XI. of the Merchant Shipping Act (a), under which the superintendence and management of lighthouses (b), buoys, and beacons, in the United Kingdom, are vested in general or local lighthouse authorities. Subject to the powers of local authorities, the general lighthouse authorities are, in England, Wales, and the Channel Islands, the London Trinity House, in Scotland and the Isle of Man the Commissioners of Northern Lighthouses, and in Ireland the Commissioners of Irish Lights. The Trinity House of London has power under the Act to erect or remove any lighthouse, buoy, or beacon, within the area of its special jurisdiction (c); and has also a general inspection and control over the exercise by the other two general lighthouse authorities, and by the local lighthouse authorities in England and Wales, of their statutory powers (d). The expenses incurred by the general lighthouse authorities in the works and services of lighthouses are defrayed out of the General Lighthouse Fund (e); into which are paid the *light dues* levied on British and foreign ships (f) according to their tonnage and to the voyages made by them (g). These dues are recoverable by distress on the ship herself and everything belonging to her (h).

Ca. 72; *Rathbone v. McIver* [1903] 2 K. B. 378; *Nelson Line v. Nelson* [1908] A. C. 16.

(a) M. S. A. 1894, ss. 634–675.

(b) Including floating lights and fog-signals of any kind (M. S. A. 1894, s. 742).

(c) M. S. A. 1894, s. 638.

(d) *Ibid.* ss. 637, 640, 641.

(e) M. S. (Mercantile Marine Fund) Act, 1898.

(f) M. S. A. 1894, s. 643.

(g) Or by way of periodical payments (M. S. (Mercantile Marine Fund) Act, 1898, s. 5).

(h) M. S. A. 1894, s. 650.

## CHAPTER XI.

OF THE LAWS RELATING TO CHARITIES AND FRIENDLY AND  
OTHER SOCIETIES.

WE will next consider the laws relating respectively to charities, and friendly and other kindred societies—all of which have, for their paramount objects, the relief of poverty, and the encouragement of thrift.

I. *Charities*.—These have been always much favoured by the law (a) ; for “no time,” as Lord Coke observes, “was so barbarous as to abolish learning, or so uncharitable as to prohibit relieving the poor” (b). When gifts to superstitious uses were made void by the 23 Hen. VIII. (1531) c. 10, gifts for charitable purposes were held not to fall within the provisions of the statute. And, by the 39 Eliz. (1597) c. 5, any person was enabled, by deed enrolled in Chancery, to found a hospital and to give it a corporate existence, with capacity to take and purchase goods and chattels, lands and tenements, and this without the King’s license in mortmain ; subject only to these conditions, that the lands were freehold, in fee simple, of the clear annual value of ten pounds, and not exceeding two hundred pounds in annual value. By the Statute of Charitable Uses of 1601 (c), the Lord Chancellor was empowered to award commissions, to inquire of all gifts to such uses, and of all abuses and breaches of trust relative thereto, and to make orders for the future management of charity funds (d) ; but the universities and cathedrals, and all colleges, hospitals, and free

(a) *Bac. Ab. Ch. Uses*, E.

(c) 43 Eliz. c. 4.

(b) *Porter’s Case* (1592) 1 Rep. 26.(d) *Bac. Ab. Ch. Uses*, F.

schools, having special visitors or governors, were excepted from this provision (a).

As, however, some abuses were found to attend the power of disposing of lands by will for charitable purposes, it was enacted by the Mortmain Act, 1735 (b), that no lands or hereditaments, or money to be laid out in the purchase thereof, should be given or conveyed, or anyways charged or incumbered, in trust for or for the benefit of any charitable uses, unless by conveyance *inter vivos*, and under conditions specified in the Act. The provisions of the Georgian Act have been re-enacted, but at the same time amended and relaxed, by the Mortmain and Charitable Uses Acts of 1888 and 1891, referred to at more length in a former volume (c); and it will suffice to say, that there is now practically no restraint whatsoever on gifts of land by will for charitable purposes. And pure personal estate may, of course, be freely given for such purposes.

Commissions under the Act of 1601, to redress abuses in charities, have been long disused, their place being supplied by remedies of a simpler character; for, independently of any statute, the King, as *parens patriæ*, has a general superintendence over all charities not otherwise sufficiently protected. Also, wherever necessary, the King's Attorney-General, at the relation of some informant, who is called the *relator*, may institute proceedings in Chancery, in his official capacity, to have the charity established, or to have the charity funds duly administered (d). And it is not essential that the relators should be the persons principally interested; for many persons, though the most remote of those who fall within the contemplation of the charity, may be relators (e) (f). Finally, by the Charities Procedure Act, 1812 (commonly called Sir Samuel Romilly's Act), in every case of the

(a) *Collison's Case* (1618) Hob. 136. *Greenhouse* (1827) 1 Bligh, (N.S.) 17.

(b) 9 Geo. 2, c. 36.

(e) *A.-G. v. Bucknall* (1741)

(c) See *ante*, vol. i. pp. 342-349.

2 Atk. 328.

(d) *Corporation of Ludlow v.*

(f) 52 Geo. 3, c. 101.

breach of any charitable trust, or wherever the direction of the court is necessary for the administration of such trust, any two or more persons may, on obtaining the previous sanction of the Attorney- or Solicitor-General, apply for relief by petition, to be heard and disposed of in a summary way; and under the Charitable Trusts Acts hereinafter referred to, and under the general jurisdiction of the court as regulated by the Rules of the Supreme Court, divers summary applications for the due administration of charitable trusts are made competent.

By the Charitable Donations Registration Act, 1812 (*a*), provision was made for the registration of charitable donations, in order to prevent their benefits from being lost; and the Act directed, as regards all then existing charities, that a memorial, stating the funds and objects thereof, the names of the founders (when known), the persons having the custody of the title deeds of the endowment, and the trustees or possessors of the estates, should be registered with the clerk of the peace of the county or town, and a duplicate of such memorial transmitted to Chancery, and, as regards all future charities, that the like memorial should be registered within twelve months after the decease of the donor. But donations not secured on land or permanently invested in the funds, and donations the management of which was left to the discretion of trustees, were, with many other particular cases, excepted from the Act. The registration of such charitable gifts is part of the business which, by the Local Government Act, 1888 (*b*), has now been transferred from quarter sessions to county councils.

Charitable endowments have been further protected by a long series of statutes passed in the eighteenth, and the first half of the nineteenth, century; but these need not here be particularly examined. It is sufficient to say that, by the Charitable Trusts Acts, 1853 to 1894 (*c*), a

(*a*) 52 Geo. 3, c. 102.

(*c*) 16 & 17 Vict. (1853) c. 137;

(*b*) 51 & 52 Vict. c. 41, s. 3.

18 & 19 Vict. (1855) c. 124; 23 &



Board of Commissioners (called the Charity Commissioners for England and Wales) has been established, with power to examine into all charities, and to prosecute all due inquiries by its officers, including assistant commissioners formerly called 'inspectors'; to require charity trustees and others to render to the Board written accounts and statements, or to attend and be examined on oath, in relation to any charity or its property; to authorise actions and proceedings concerning the same; to sanction building leases, repairs, improvements, sales, and exchanges of charity lands; to frame and to approve new schemes, and, in cases of difficulty, to certify to Parliament, for the approval of Parliament, any such new schemes, for the better management of charities (a); and to permit a great variety of other acts to be done in relation to charities, such as the varying circumstances of each case may from time to time require. But such powers, at least in some cases, are subject to the control of the Courts. And the Courts will discharge an order of the Commissioners which is *ultra vires*, and remit the scheme to the Commissioners for reconsideration (b).

The Charitable Trusts Acts also authorise the appointment of corporate bodies, called The Official Trustees of Charity Lands, and The Official Trustees of Charitable Funds, in whom respectively the lands, stocks, securities, and moneys of charities may from time to time become or be vested by order of the Court (c); and the Commissioners may order these corporations respectively to convey the land, or to assign and pay over the stocks, securities, and moneys, as they shall think expedient (d). And although, by the Roman Catholic Charities Act,

24 Vict. (1860) c. 136; 25 & 26 Vict. (1862) c. 112; 32 & 33 Vict. (1869) c. 110; 50 & 51 Vict. (1887) c. 49; 54 & 55 Vict. (1891) c. 17; and 57 & 58 Vict. (1894) c. 35.

(a) Act of 1853, ss. 54, 60.

(b) *In re Weir Hospital* [1910] 2 Ch. 124.

(c) Act of 1853, ss. 48, 53; Act of 1855, s. 15, etc.

(d) Act of 1855, s. 37; Act of 1887.

1859, charities or institutions exclusively for the benefit of Roman Catholics were for some time exempt from the jurisdiction of the Charity Commissioners, these charities are now, to a certain extent, subject to that jurisdiction; the Roman Catholic Charities Act, 1860, having enacted, that, in cases where an estate is given on trust for the exclusive benefit of Roman Catholics, but is invalidated by reason of certain of the trusts being of the class deemed superstitious or otherwise illegal, such estate or its income shall be apportioned in Chancery, or by the Charity Commissioners, and a fixed proportion thereof shall be declared subject to the lawful trusts, and the residue subject to such trust for the benefit of persons professing the Roman Catholic religion, as the Court or Board may, under the circumstances, consider just. Also, by the City of London Parochial Charities Act, 1883, the Charity Commissioners have been entrusted, subject to the regulation of the High Court, with the management and disposition of the parochial charities within the City; and under the Local Government Act, 1894, the Charity Commissioners exercise a controlling power over the charities of rural parishes, the management of which is now vested in the parish councils. For the Local Government Act, 1894, transfers to and vests in the parish council of every rural parish all the charitable property (not being church property) theretofore vested in the overseers, or in the churchwardens and overseers, of the parish (*a*); and enables the parish council to acquire further endowments for the parish (*b*), and to deal therewith, subject to the control of the Local Government Board or of the Charity Commissioners (*c*). For the purposes of the London Government Act, 1899 (*d*), the Charity Commissioners "have the like powers with respect to charities, subject "to the like appeal, as they have under and for the

(*a*) 56 & 57 Vict. c. 73, s. 5.

(*b*) *Ibid.* s. 8.

(*c*) *Ibid.* ss. 8, 14.

(*d*) S. 23.

“purposes of the Local Government Act, 1894.” By the Board of Education Act, 1899, there may be transferred to the Board of Education any of the powers of the Charity Commissioners in matters relating to education ; and, by Order in Council of 1900 (*a*), there have accordingly been transferred to that Board most of the powers conferred on the Charity Commissioners by the Charitable Trusts Acts, 1853 to 1894, or the Endowed Schools Act, 1869 to 1889, so far as those powers are exerciseable in respect of any endowment so regulated. With such transfer, there has also been transferred to the Board the power of inquiring into such charities, their accounts and records.

A great number of cases, however, are exempted from the operation of the Charitable Trusts Acts ; for these Acts extend not to the Universities of Oxford, Cambridge, London, or Durham, nor to any college or hall in those universities, nor to any endowment directly controlled by the dean and chapter of any cathedral or collegiate church (*b*), nor to the colleges of Eton and Winchester (*c*). But as regards ‘prison charities,’ within the Prison Charities Act, 1882 (*d*), these are only partially exempt from the jurisdiction of the Charity Commissioners ; and any of the exempted charities may petition the Board to have the benefit of the above enactments allowed to them. And any charities whatever may refer to the Board any questions or disputes arising between or among their members, touching the constitution or the management of the charity (*e*).

Some account having now been given of the legislative enactments relating to charities, we will next advert to certain general principles which may be collected from the judicial decisions in regard to charitable donations, trusts, and endowments. First, all trustees of charities

(*a*) S. R. & O., 1900, pp. 168–170.

(*b*) Act of 1853, s. 62 ; *Re Dod’s Charity* [1905] 1 Ch. 442.

(*c*) Act of 1855, ss. 47–49.

(*d*) 45 & 46 Vict. c. 65.

(*e*) Act of 1853, s. 64 ; Act of 1855, s. 46 ; Act of 1869, s. 14.

may be called to account in Chancery for the funds committed to their charge, and new trustees, where circumstances so require, may be appointed (a); improvident alienations of charitable estates may be rescinded; schemes for carrying properly into effect the intentions of the donor, or, where the case calls for such interference, for varying his intentions in the manner hereinafter explained, may be established; and in fact every species of relief may be afforded, which it is in the nature of such institutions to require. But in the case of corporations endowed for charitable purposes, the management is usually vested in governors, subject to a controlling or visitatorial power in the founder and his heirs, or in such persons as the founder shall appoint (b); and with the proceedings of such functionaries the law does not in general interfere, unless they have also the management of the revenues, and are found to be abusing their trust (c). It is to be observed, however, that, when the King is the founder of an eleemosynary lay corporation, the visitatorial power is vested in the Crown, and is committed by royal authority to the Lord Chancellor; who may thus be called upon to redress abuses properly falling within the province of a visitor. But the jurisdiction belongs to him in his personal character only, as representative of the Crown, and not as a judge (d).

Second, with regard to the nature of charitable trusts, we may remark, that the word 'charitable' is to be understood in a very large sense; as including not only gifts for the benefit of the poor, but also all endowments for

(a) Such new trustees may also (without the aid of the court) be appointed under the Trustee Appointment Acts, 1850 to 1890 (13 & 14 Vict. (1850) c. 28; 32 & 33 Vict. (1869) c. 26; and 53 & 54 Vict. (1890) c. 19), in the case of all trusts for religious or educational purposes.

(b) *Eden v. Foster* (1725) 2

P. Wms. 326; *R. v. Governors of Darlington Free Schools* (1844) 6 Q. B. 682.

(c) *A.-G. v. Talbot* (1747) 3 Atk. 673; *Ex parte Berkhamstead Free School* (1813) 2 V. & B. 138.

(d) *Co. Litt.* 96 a; *R. v. St. Catherine's Hall* (1791) 4 T. R. 233.

the advancement of learning (a) ; as well as institutions for the advancement of science and art, and for any other useful and public purpose falling within the charitable uses enumerated in the preamble to the Act of 1601 (which is repeated in the Mortmain and Charitable Uses Act, 1888), or falling within the meaning and intendment of such preamble (b). The term comprises also donations for pious or religious objects, all objects being deemed religious which tend to the benefit either of the Established Church of England, or of any body of Dissenters ; and trusts for the maintenance of the Roman Catholic worship, subject always to the law against uses deemed superstitious, were also long ago placed on a similar footing (c). And, though a trust for the advancement of the Jewish religion, as well as of any other faith hostile to Christianity, was at one time held illegal, and as such was excluded from the protection of Chancery (d), it was provided, by the Religious Disabilities Act, 1846, and the Liberty of Religious Worship Act, 1855, that Her Majesty's subjects professing the Jewish religion should be liable, in respect of their schools, places for religious worship, education, and other charitable purposes, and the property held therewith, to the same laws as those to which Her Majesty's Protestant subjects dissenting from the Church of England were liable, and to no other. In fact, it would seem, that every gift in which a very large or indefinite body of persons may claim to participate is a 'charitable gift' (e) : and the poverty of the recipient is not an essential ingredient of any charity (f). But the definition of charitable trusts does

(a) *A.-G. v. Whorwood* (1750)  
1 Ves. Sen. 537.

(b) *A.-G. v. Heclis* (1824) 2  
Sim. & St. 67 ; *Trustees of*  
*British Museum v. White* (1826)  
*ib.* 594.

(c) Roman Catholic Charities  
Acts, 1832 and 1860 ; Liberty of  
Religious Worship Act, 1855, s. 2.

(d) *De Costa v. Da Paz* (1754)  
1 Dick. 258 ; *In re Masters, etc.,*  
*of the Bedford Charity* (1818) 2  
Swanst. 487.

(e) *Re Foveaux* [1895] 2 Ch.  
501.

(f) *Commissioners of Income*  
*Tax v. Pemsel* [1891] A. C. 531.

not include gifts of a strictly private character ; for if a sum of money be bequeathed with a direction to apply it “ to such purposes of benevolence and liberality as the “ executors shall approve,” or even “ in private charity,” no charitable trust will be created, *i.e.*, no such trust as will be taken cognisance of in Chancery. On the other hand, where the testator expresses a general charitable intention, the court will endeavour to preserve this intention, and carry out the general charitable intention *cy-près* ; but this will not permit a testator to word his directions so vaguely that in effect he leaves it to his trustees to make a will for him instead of making it himself (a).

Thirdly, it is a rule, with respect to all charities, that the intention of the donor, so far as it is practicable and legal, shall be strictly observed ; the law not permitting it to be varied without necessity, even by consent of his heirs (b). But, where such intention is incapable of being literally acted upon, or its literal performance would be unreasonable, a decree will be made for its execution *cy-près* ; that is, in some method conformable to the general object, and adhering as closely as possible to the specific design, of the donor (c). For example, where a sum of money was bequeathed to trustees, to be distributed among the inhabitants of several specified parishes, in money, provisions, physic, or clothes, as the trustees should think fit, and the fund ultimately became too large to be suitably confined to those objects, the Court directed it to be applied to the further objects of instructing and apprenticing the children of those

(a) *Grimond v. Grimond* [1905] A. C. 124. See also *Blair v. Duncan* [1902] A. C. 37, and *In re Garrard* [1907] 1 Ch. 382.

(b) *A.-G. v. The Margaret and Regius Professors in Cambridge* (1682) 1 Vern. 55 ; *Weir*

*Hospital Case* [1910] 2 Ch. 124.

(c) *Chamberlayne v. Brockett* (1872) L. R. 8 Ch. App. 206 ; *In re Clark's Trusts* (1875) 1 Ch. D. 497.

parishes to benefit which the charity was designed (a) ; and, on a somewhat similar principle, in the case of meeting-houses founded for Dissenters, it was declared, by the Nonconformists Chapels Act, 1844, that, where no particular religious doctrines or mode of worship should have been prescribed by the deed or instrument of trust, the usage of the congregation for twenty-five years should be taken as conclusive evidence of the doctrines and worship to be observed or practised therein (b).

Lastly, we may remark, that, though among the civilians a legacy to pious or charitable uses was entitled to a preference over other bequests in a will, it is not so by our law ; which directs that, in the case of a deficiency of assets, the charitable legacies shall abate *pro ratâ* with the others. But the testator may, of course, give the charitable legacies a priority over all other legacies (c).

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| (a) <i>A.-G. v. Mansfield</i> (1845)   | 6 Eq. 563.                           |
| 14 Sim. 601; <i>Re Campden</i>         | (c) <i>Miles v. Harrison</i> (1874)  |
| <i>Charities</i> (1881) 18 Ch. D. 310. | L. R. 9 Ch. 316; <i>In re Arnold</i> |
| (b) <i>A.-G. v. Bunce</i> (1868) L. R. | (1888) 37 Ch. D. 637.                |

## CHAPTER XII.

## OF THE LAWS RELATING TO LUNATIC ASYLUMS, INEBRIATE HOMES, AND INSTITUTIONS FOR DEFECTIVES.

WE have had occasion elsewhere to refer incidentally to the provisions of the law with reference to idiots and lunatics (*a*). We now proceed to consider more fully the provisions made by the legislature for the reception, detention, and care of lunatics, inebriates, and persons who are mentally defective, in asylums or other institutions.

The places in which lunatics may be lawfully confined include not only lunatic asylums provided and maintained by county authorities, and criminal lunatic asylums, but hospitals, workhouses, and houses licensed for the reception of lunatics. Habitual drunkards and persons who are mentally defective may be detained in institutions appropriated for that purpose.

It will be convenient to treat first of county asylums, then workhouses, and licensed houses, then of private lunatic asylums, then of criminal lunatic asylums, then of inebriate reformatories, and, lastly, of institutions for the care of persons who are mentally defective.

I. *County Asylums*.—County lunatic asylums were first established in the year 1808, by the 48 Geo. III. c. 96; from 1853 to 1890 they were regulated by the Lunatic Asylums Act, 1853, and a number of amending statutes. But all these were repealed, and their provisions (with amendments) consolidated, by the Lunacy

(*a*) See *ante*, vol. i. pp. 372, 373; vol. ii. pp. 618–622.



Act, 1890 (*a*); which has been amended, in some particulars, by the Lunacy Acts, 1891, 1908 and 1911, and the Mental Deficiency Act, 1913 (*b*).

By virtue of the Lunacy Act, 1890 (*c*), and the Local Government Act, 1888 (*d*), every 'local authority,' *i.e.* the council of every county and county borough, and of certain specified boroughs, must provide and maintain a sufficient asylum for its *pauper* lunatics. These asylums are visited by a committee appointed by the local authority, called the visiting committee (*e*).

These pauper lunatic asylums are supplementary, in a sense, to the administration of the Poor Law. They became necessary after the provision of the Poor Law Amendment Act, 1834 (*f*), whereby it was made penal to confine any insane person, having dangerous tendencies, for more than fourteen days in any workhouse. Harmless chronic pauper lunatics, and lunatics on special order, may now be detained in *workhouses* in certain cases; and pauper lunatics discharged from asylums, hospitals, or licensed houses, may also, in proper cases, be detained as lunatics in workhouses (*g*). But in the ordinary course, lunatic paupers are kept in the county asylums.

The provisions for the reception of pauper lunatics into asylums are briefly as follows (*h*):

Any medical officer of a union who has knowledge that a pauper resident in his district is, or is thought to be, a lunatic and a proper person to be sent to an asylum, must give notice to the relieving officer of the district,

(*a*) 53 Vict. c. 5.

(*b*) 54 & 55 Vict. c. 65; 8 Edw. VII. c. 47; 1 & 2 Geo. V., c. 40; 3 & 4 Geo. V. c. 28:

(*c*) Ss. 238, 240. The specified boroughs are those in Sched. IV. of the Act.

(*d*) 51 & 52 Vict. c. 41, s. 3 (*vi.*)—"The provision, enlarge-

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"ment, maintenance, management, and visitation of, and other dealing with, asylums for pauper lunatics."

(*e*) Lunacy Act, 1890, ss. 169-176, 188-190, 239, 240.

(*f*) S. 45.

(*g*) Lunacy Act, 1890, ss. 24-26.

(*h*) *Ibid.* ss. 14-21.

or, if there be no such officer, to an overseer of the parish where the pauper resides. Any relieving officer of a parish (and every overseer of a parish where there is no relieving officer) who has knowledge that any pauper resident in such parish is thought to be a lunatic, must give notice thereof to some justice having jurisdiction in the place where the pauper resides, who thereupon makes an order for the pauper to be brought before him, or before some other justice of the county. The justice before whom the pauper is brought, is to call in medical aid; and if, upon examination of the pauper, the medical man certifies that the pauper is insane, the justice may make an order, directing the pauper to be received into the asylum of that county, or, under special circumstances, into some other asylum, or into a hospital or house for lunatics, such hospital or house being duly registered or licensed. The justice may, instead of ordering the alleged lunatic to be brought before him, examine him at his (the lunatic's) own house or elsewhere. These summary reception orders can also be made in respect of any lunatic wandering at large (*a*). Pauper lunatics are received into any asylum, hospital, or licensed house, only on a 'reception order' or 'summary reception order' of a justice (*b*), or of the chairman of the board of guardians, if duly authorised by the Lord Chancellor to sign such reception order (*c*). And a justice is, in no case, to sign such reception order for an alleged pauper lunatic, without first satisfying himself that the alleged pauper either is in receipt of relief, or is in such circumstances as to require relief (*d*).

Summary reception orders may also be made in respect of persons, not being pauper lunatics, who are not under proper care or control, or who are cruelly treated or neglected by the person having charge of them. Such persons may, on the sworn information of a

(*a*) Lunacy Act, 1890, s. 15.

(*c*) Act of 1891, s. 25.

(*b*) *Ibid.* ss. 13, 14, 16, 315.

(*d*) Act of 1890, s. 18.

constable, relieving officer, or parish overseer, be personally visited by a justice, who shall authorise and direct two medical practitioners to visit and examine them, and to certify as to their mental condition; and the justices may, in a proper case, and on the certificates of such medical practitioners, cause the lunatic to be confined, either in a pauper asylum or in a hospital or licensed house, unless the person in charge of the lunatic satisfies the justice that he will take proper care of him. And in such cases, the medical certificates must be attached to the reception order (a).

There may be admitted by agreement between the respective visiting committees (b) into the lunatic asylum of any county or borough, the pauper lunatics of any other county or borough (c). In such cases, the committees have power to fix a higher scale of payment for the maintenance of pauper lunatics from the out-county (d).

The expenses of maintenance of every pauper lunatic in an asylum are chargeable to the union from which he is sent; until it is ascertained that he is settled or has acquired a status of irremovability (e) in some other union, when they become chargeable to that union (f). If his settlement cannot be ascertained after proper inquiry, the expenses of his maintenance are chargeable to the local authority, and are payable out of the county or borough fund (g). Two justices of the county or borough are empowered to inquire into and adjudicate upon the settlement of pauper lunatics, and to make orders for the payment of their maintenance by the guardians (h). But, any property of the lunatic, if more than sufficient for the maintenance

(a) Act of 1891, s. 5.

(b) *Ante*, p. 193.

(c) Act of 1890, ss. 269–271.

(d) *Ibid.* s. 283; *Fitch v. Bermondsey Guardians* [1905] 1

K. B. 524.

(e) See *ante*, pp. 39–40.

(f) Act of 1890, ss. 286–298.

(g) Act of 1890, ss. 273, 290.

(h) *Ibid.* ss. 288, 289.

of his family, may, by order of a justice, or of a county court judge, be made available to recoup the expenses of his maintenance (*a*). And the usual liability of husbands and wives and parents and children to maintain each other, is unaffected by the fact that the pauper is detained in an institution for lunatics. It should further be noticed, that private persons may be received as patients into any asylum; upon such terms as to payment and accommodation as the visiting committee think fit (*b*).

For the protection of persons other than pauper lunatics against wrongful detention as lunatics, it is provided by the Act that no person (other than a criminal lunatic, or a pauper lunatic, or a lunatic wandering at large, or a lunatic so found by inquisition) shall, excepting in cases of urgency, be received or detained as a lunatic in any asylum, hospital, or licensed house, or as a single patient; unless under the reception order of a county court judge or a stipendiary magistrate, or of one of the justices of the peace specially appointed for the purpose at quarter or special sessions (*c*). A reception order is obtained on private application by petition, accompanied by a statement of particulars, and two medical certificates under the hands of two medical practitioners (*d*). The judge, magistrate, or justice may himself visit the alleged lunatic, to satisfy himself as to the lunacy (*e*). And the reception order, with the medical certificates attached, is a sufficient authority for the petitioner (within seven clear days from its date) to take the lunatic to the place mentioned in the order for his reception and detention (*f*). In cases of urgency, the lunatic may be temporarily received and detained under an 'urgency order' made (if possible) by the husband, wife, or a

(*a*) Lunacy Act, 1890, ss. 299–300. jurisdiction in certain cases. (See Act of 1891, s. 24.)

(*b*) *Ibid.* s. 271.

(*d*) Act of 1890, s. 4.

(*c*) *Ibid.* s. 10. Such justices may act outside their usual

(*e*) *Ibid.* s. 6.

(*f*) *Ibid.* s. 36.

relative of the lunatic ; accompanied by one medical certificate. But no one may sign an urgency order unless he is twenty-one years of age, and has personally examined the lunatic within two days before signing (*a*). An urgency order may be made pending a petition for a reception order. It only remains in force seven days, or until a pending petition is disposed of (*b*).

The Act contains minute provisions for the protection of persons from being wrongfully confined as lunatics by their relatives ; and, with a view to ascertaining whether or not the detention of persons as lunatics is in the first instance lawful, it specially provides that, within one month after the reception of a lunatic, the medical superintendent, medical proprietor, or medical attendant, as the case may be, who has charge of him, shall report as to his mental and bodily condition to the Board of Control (*c*). Thereupon one or more of the Commissioners constituting the Board must visit the lunatic ; and the Visitors in Lunacy are also to visit him if he is detained as a private patient in a licensed house within their district. And, according to the true state of the alleged lunatic, he may be either discharged from, or continued in, detention (*d*).

The Act also provides, that reception orders shall in general continue good for one year only, but may (where necessary) be continued for two years, and again for three years, and again for five years ; after which they may be continued for successive periods of five years (*e*). These orders are now continued, and successively continued, for the periods aforesaid, automatically ; that is to say, merely upon the medical officer or medical attendant, who has the lunatic in his charge, specially reporting to the Board of Control from time to time, as prescribed, that the lunacy still continues (*f*). But the Board may,

(*a*) Act of 1890, s. 11.

(*b*) *Ibid.* s. 11 (6).

(*c*) *Ibid.* s. 39.

(*d*) *Ibid.*

(*e*) *Ibid.* s. 38.

(*f*) Act of 1891, s. 7.

at any period of the detention of the lunatic, visit him ; and, if he is detained without sufficient cause, they may order his discharge (a). Also, any one, whether a relative or not of the alleged lunatic, may obtain an order from the Board of Control for the examination of the lunatic by two medical practitioners authorised by the Board ; and on the certificate of such practitioners, the Board may, in a proper case, order the discharge of the alleged lunatic (b).

Any alleged pauper lunatic may, in a proper case, and upon an order of the visiting committee, be delivered over to relatives or friends willing to take care of him (c) ; and these latter may in such case receive an allowance from the Poor Law authority towards the cost of his maintenance. The Act also provides, that lunatics detained by persons receiving no payment therefor, or deriving no profit therefrom, or lunatics who are detained in charitable or other like institutions (not being asylums, hospitals, or licensed houses), may be discharged or removed to an asylum, hospital, or licensed house, by order of the Lord Chancellor, upon a report as to their condition transmitted to him by the Board of Control (d). And there are also many other provisions contained in the Act, which have for their object the comfort and humane treatment of lunatics during the period of their detention (e) ; including the proper management of asylums, hospitals, and licensed houses, and their enlargement when necessary. In case a lunatic who is lawfully detained escapes, he may be retaken in England, Scotland, or Ireland, on the warrant of a justice of the peace ; to

(a) Act of 1890, s. 38.

(b) *Ibid.* s. 49.

(c) *Ibid.* s. 57.

(d) *Ibid.* s. 206.

(e) Female (and not male) attendants are to have the personal charge of female lunatics (s. 53), unless in cases of urgency ; and

having carnal intercourse with any such lunatic, whether she consent or not, is an offence punishable with imprisonment, for two years, with or without hard labour. (Act of 1890, s. 324.)

be obtained by any person in that behalf authorised by the Board of Control (a).

II. *Private Asylums*.—The provisions which have been made to secure the proper treatment of lunatics, and to regulate private establishments receiving them, may be summarised as follows. In addition to the provisions of the Lunacy Act, 1890, above stated, regulating the original reception and subsequent detention, and providing against their wrongful confinement, and for their humane treatment during their lawful confinement, it has been provided by the same Act (repealing but re-enacting the like provisions contained in previous statutes), that it shall be a misdemeanour for any person to receive two or more lunatics into any house, not being a county or borough lunatic asylum, which is not either a hospital duly registered, or some house duly licensed for the reception of lunatics (b); and to receive any lunatic, for payment, in an unlicensed house, is punishable with a penalty not exceeding 50*l.* (c). Hospitals, wherein lunatics are to be received, must be registered with the sanction of the Board of Control (a body of Commissioners comprising barristers and medical men established by the Mental Deficiency Act, 1913 (d), in place of the Commissioners of Lunacy (e)). Licenses for keeping houses for such purpose are granted by the Board for Middlesex, London, Westminster, Southwark, and all places within the range of seven miles from any part of London, Westminster, or Southwark. In other places, licenses for keeping such houses (the houses have been first inspected by the Board) may be granted by the justices in general or quarter sessions assembled (f); but the license is in no case to be

(a) Act of 1890, ss. 85–89.

(b) *Ibid.* s. 315.

(c) *Ibid.*

(d) Ss. 22, 65.

(e) Established in 1845, continued by Lunacy Act, 1890, s. 3.

(f) Act of 1890, s. 208, and Schedule III.

for a period exceeding thirteen calendar months, and therefore requires periodical renewal (*a*). Moreover, since 1890, new licenses can only be granted by way of renewal of, or, in substitution for, licenses in existence at the date of the passing of the Act. No wholly new licenses can now be granted; the policy of the Act being to extinguish private asylums (*b*).

The Lunacy Act, 1890, contains also minute provisions, for the effectual superintendence of all such-registered hospitals and licensed houses; requiring, *e.g.*, that the keepers of such hospitals and houses shall report the admission, death, removal, discharge, or escape of any patient, and shall provide the patient with proper medical attendance (*c*); also, that all such hospitals and licensed houses shall be visited by the commissioners, and (in the country) by special visitors appointed by the magistrates (*d*), and that special visits may in particular cases be directed (*e*); and that reports shall be made by the Board of Control to the Lord Chancellor, of the state of the several houses visited by the Commissioners, and as to the care taken of the patients therein (*f*). Moreover, a person detained in a licensed house or hospital without sufficient cause may, by the Board, be set at liberty (*g*); but this power does not, of course, extend to enabling the Board to order the discharge of a person found lunatic under a *commission*, or of one who is in confinement by order of the Secretary of State, or under the order of any court of criminal jurisdiction. The Board may also visit all asylums, gaols, and workhouses where any lunatics are confined, and inquire into the condition, system, and regulations of such asylums, gaols, and workhouses; and, in the case of workhouses, they

(*a*) Act of 1890, ss. 207, 216.

(*b*) *Ibid.* s. 207.

(*c*) *Ibid.* ss. 43-52.

(*d*) *Ibid.* ss. 191-200.

(*e*) *Ibid.* s. 204.

(*f*) *Ibid.* s. 162.

(*g*) *Ibid.* ss. 72-78.



report thereon to the Local Government Board. And generally, the Lord Chancellor, in the case of lunatics under the care of committees, and either the Lord Chancellor or the Home Secretary, in the case of other persons under restraint as lunatics, may direct the Commissioners or any special commissioner to visit the lunatic, and to inquire into such matters as are directed by the order, and to report to him the result of the inquiry.

III. *Criminal Lunatics*.—A criminal lunatic may be defined as a person who is found to have committed a crime while “labouring under such a defect of reason, “from disease of the mind, as not to know the nature and “quality of the act he was doing; or if he did know it, “that he did not know he was doing what was wrong” (a). The Criminal Lunatics Act, 1884 (b), which repeals and consolidates, with amendments, the earlier general Acts upon the subject (c), provides, that where it appears to any two members of the visiting committee of a prison that a prisoner in such prison (not being under sentence of death) is insane, they shall call to their assistance two legally qualified medical practitioners, to examine the prisoner and inquire as to his insanity; and, after such examination and inquiry, they may certify in writing that the prisoner is insane. As regards any prisoner who is under sentence of death, if it appears to the Secretary of State, either by means of a certificate signed by two members of the visiting committee of the prison in which such prisoner is confined, or by any other means, that there is reason to believe such prisoner to be insane, the Secretary of State is to appoint two or more legally qualified medical practitioners to examine the prisoner

(a) *McNaghten's Case* (1843) 10 Cl. & F. 200. See also *Criminal Lunatics Act, 1884*, ss. 2, 16. Acts, 1840–1869 (3 & 4 Vict. (1840) c. 54; 27 & 28 Vict. (1864) c. 29; 30 & 31 Vict. (1867) c. 12; and 32 & 33 Vict. (1869) c. 78).

(b) 47 & 48 Vict. c. 64.

(c) The Criminal Lunatics

and inquire as to his insanity. Upon a certificate of insanity being given, in either case, the Secretary of State may, if he thinks fit, issue his warrant for the removal of such prisoner to the asylum named in the warrant; and the prisoner is to be received into such asylum accordingly, and, subject to the provisions of the Act relating to his conditional discharge and otherwise, he is to be detained therein, or in any other asylum to which he may be transferred in pursuance of the Act, as a criminal lunatic, until he ceases to be a lunatic (a). Should the criminal lunatic at any time afterwards be certified to have become sane, he is to be remitted to prison, by warrant of the Secretary of State, there to complete his sentence (b); but as regards any such criminal lunatic found to have been insane at the date of the commission of the offence, the Trial of Lunatics Act, 1883, provides, that, the jury having first returned a special verdict to that effect, the court shall order the accused to be kept in custody as a criminal lunatic, in such place as the court shall direct, during His Majesty's pleasure.

The proper prison for persons removable under the provisions of the Acts relating to criminal lunatics, is some asylum appropriated by law for the custody and care of such criminals as shall become insane during their imprisonment, or of such persons as shall be acquitted at their trial, on the ground of insanity, under the Criminal Lunatics Act, 1800 (c); for the Criminal Lunatic Asylums Act, 1860 (amended by the Criminal Lunatics Act, 1884), provides, that His Majesty may, from time to time, by warrant under his royal sign manual, appoint that any asylum or place in England which has been provided for the purpose, shall be an asylum for criminal lunatics,

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| (a) Act of 1884, ss. 2, 10;           | to an ordinary asylum.            |
| <i>Bradford Union v. Wilts</i> (1868) | (b) Act of 1884, s. 3.            |
| L. R. 3 Q. B. 604. Section 9          | (c) 39 & 40 Geo. 3, c. 94.        |
| of the Act deals with the trans-      | (And see 3 & 4 Vict. c. 54, s. 3, |
| fer of a lunatic from a criminal      | since repealed.)                  |

and that the Secretary of State may from time to time appoint a council of supervision thereof, and also a resident medical superintendent, chaplain, and such other officers and servants as he shall think necessary, and may frame such rules for its guidance and management, as may be required (*a*). The Secretary of State may also, at any time, order the discharge of any such criminal prisoner, either absolutely or on conditions; and, if the conditions be broken, may cause the prisoner to be recaptured (*b*). He may also permit any such criminal prisoner to be absent, on probation, from his place of confinement, on such conditions as he may think fit. The Act contains provisions for the contingency of the term of punishment awarded to any criminal, who shall become lunatic, expiring before he recovers the use of his reason (*c*); and also provisions for the care of such criminal lunatics as shall be or become pauper lunatics (*d*).

IV. *Retreats and Reformatories for Inebriates*.—Provision for the detention of habitual drunkards was first made by the Habitual Drunkards Act, 1879, which legalised and regulated their detention in retreats if they consented. In 1898, the legislature went a step further, by instituting State reformatories to which habitual drunkards may be committed without their consent (*e*). Habitual drunkards are persons who, not being amenable to any jurisdiction in lunacy, are notwithstanding, by reason of habitual intemperate drinking of intoxicating liquor, at times dangerous to themselves or to others, or incapable of managing themselves or their affairs (*f*).

Retreats for habitual drunkards must be licensed by the local authority (*i.e.*, the borough or county council), and are subject to inspection (*g*). They may be established

(*a*) Act of 1860, ss. 1, 4, and 5.

(*b*) Act of 1884, s. 5.

(*c*) *Ibid.* s. 6.

(*d*) *Ibid.* s. 7.

(*e*) Inebriates Act, 1898.

(*f*) Habitual Drunkards Act, 1879, s. 3.

(*g*) *Ibid.* ss. 6, 13.

by private persons, but the local authority may contribute to the expenses (a). Habitual drunkards may be admitted upon their own application in writing; and, when admitted, may not leave until the expiration of the term mentioned in the application, provided such term does not exceed two years (b).

A woman who is a habitual drunkard may also, with her consent, be committed to be detained in a retreat upon an application of her husband, under the Summary Jurisdiction (Married Women) Act, 1895, for a separation order; such committal being made as an alternative to an order that the husband shall be no longer bound to cohabit with his wife (c). Moreover, when a parent is convicted of cruelty, or of certain other offences committed in respect of his or her child, if such parent is a habitual drunkard, the Court before which he or she is convicted may, even without his or her consent, sentence him or her to detention in a retreat (if the licensee is willing to receive such person) for a period not exceeding two years, in lieu of imprisonment (d).

By the Inebriates Act, 1898, the Secretary of State was empowered to establish inebriate reformatories, and to certify reformatories established by county or borough councils. County and borough councils are also empowered to establish and maintain, or contribute towards the establishment and maintenance of, inebriate reformatories. These State or certified reformatories are used for the reception of criminal habitual drunkards. The persons who may be sent to them are habitual drunkards convicted on indictment of an offence punishable with imprisonment or penal servitude; if the Court is satisfied that the offence was committed under the influence of drink, or that drunkenness was a contributing cause of

(a) Inebriates Act, 1898, s. 14.

(c) Licensing Act, 1902, s. 5

(b) Habitual Drunkards Act, (2).

1879, s. 10; Inebriates Act,  
1898, s. 16.

(d) Children Act, 1908, s. 26.

the offence, or that the persons convicted are habitual drunkards who have been convicted four times within twelve months of certain offences punishable on summary conviction, of which drunkenness is an ingredient (*a*). In either case the habitual drunkard may be detained for a period not exceeding three years (*b*).

*V. Institutions for Defectives.*—The Mental Deficiency Act, 1913, makes provision for the detention in institutions of ‘defectives,’ *i.e.* idiots, imbeciles, feeble-minded persons, and moral imbeciles as defined by the Act (*c*). Such persons may be sent to institutions, in some cases at the instance of a parent or guardian, and, in all cases, if found neglected or abandoned, or convicted of a criminal offence, or if they are habitual drunkards, or (in the case of women) are in receipt of poor relief at the time of giving birth to an illegitimate child, or when pregnant of such child (*d*). An order that such a person shall be sent to an institution authorises his or her detention for one year (*e*); and thereafter the detention may from time to time be continued indefinitely by the Board of Control, which is charged with the general supervision, protection, and control over defectives. The Board will supervise the administration by local authorities of their powers and duties, will certify, approve, and inspect institutions, houses and homes for defectives, visit them through Commissioners, and take such steps as may be necessary for ensuring suitable treatment of defectives (*f*).

Local authorities (*i.e.* borough and county councils) are required to appoint committees for the care of defectives within their areas, and to make suitable provision and provide accommodation and maintenance in institutions or homes (*g*). But the Board of Control may itself establish

(*a*) Inebriates Act, 1898, ss. 1 and 2.

(*b*) *Ibid.*

(*c*) Mental Deficiency Act, 1913, s. 1.

(*d*) *Ibid.* ss. 2–4.

(*e*) *Ibid.* ss. 10, 11.

(*f*) *Ibid.* s. 25.

(*g*) *Ibid.* ss. 27–31.

State institutions for violent and dangerous defectives (*a*) ; and local authorities are empowered to undertake or contribute towards the establishment of institutions, and to contract with the managers for the reception and maintenance of defectives in certified institutions (*b*). The Board of Control is empowered to grant certificates to the managers of institutions if satisfied of their fitness for the reception of defectives (*c*), and may also certify houses carried on for their reception for private profit (*d*), and approve homes where defectives are received and supported wholly or partly by voluntary contributions (*e*).

The Act also empowers the Secretary of State to make regulations for the management and inspection of certified institutions and houses, and contains many provisions for the treatment of defectives detained therein, and for their protection from ill-treatment (*f*).

The Act also makes it unlawful for a person, without the consent of the Board of Control, to undertake the care and control of more than one person who is a defective, elsewhere than in an institution, a certified house, or an approved home (*g*).

(*a*) Mental Deficiency Act, 1913, s. 35.

(*b*) *Ibid.* s. 38.

(*c*) *Ibid.* s. 36.

(*d*) *Ibid.* s. 49.

(*e*) *Ibid.* s. 50.

(*f*) *Ibid.* s. 41 and ss. 51–63.

(*g*) *Ibid.* s. 51.

## CHAPTER XIII.

OF THE LAWS RELATING TO HOUSES OF PUBLIC RECEPTION  
AND ENTERTAINMENT.

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THE subject which demands our consideration in this chapter is the law relating to the sale of intoxicating liquors. The laws relating to theatres and music and dancing, will also be summarised.

I. *The Laws relating to the sale of Intoxicating Liquors.*—The enactments relating to this subject are of two kinds ; the one aiming at revenue, the other at securing the proper police regulation of these places, and the prevention of the abuses to which they are peculiarly subject. And as we have in a previous volume already sufficiently discussed such of these enactments as relate to the excise, we will here only mention that an excise licence is required by all persons who sell intoxicating liquors (a), under heavy penalties (b).

Sales of intoxicating liquors are either sales by dealers or sales by retailers. An excise licence is required for all sales, whether by dealers or by retailers ; but the jurisdiction of justices to grant licences is confined to retail sales. And a justices' licence is required for all

(a) ' Intoxicating liquors ' include spirits, wine, beer, porter, cider, perry, and sweets ; the term ' sweets ' including British wines and liquor made from fruit and sugar which has undergone a process of fermentation in its manufacture (Licensing (Consolidation) Act, 1910, s. 110 ;

Finance (1909-10) Act, 1910, s. 52).

(b) These licences are granted under the Excise Licences Act, 1825 (6 Geo. 4, c. 81), and the Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8, Part II., First Sched.).

sales by retail, with very few exceptions (a); but not for sales by dealers.

The first enactments which related to the police regulation of public houses and other places where intoxicating liquors are sold by retail were passed as early as the reign of Edward the Sixth; and, from that time down to 1910, a great number of statutes relating to this subject were enacted. Most of these have now been repealed; and the greater part of the law on the subject will be found in the Licensing (Consolidation) Act, 1910 (b).

The justices' licences for sale by retail are of many kinds; the retailer must obtain a justices' licence, as well as the corresponding excise licence, authorising sales of the kind which he requires. Justices' licences are of two principal classes:—(i) on-licences, which are required for retailing intoxicating liquor for consumption *both on and off* the premises, where it is sold, and (ii) off-licences, under which liquor can *only* be sold for consumption *off* the premises where it is sold.

(i) *On-Licences*.—On-licences again, are of many kinds (c). The first and best known is the 'publican's on-licence,' which entitles the holder to take out an excise licence for sale of any intoxicating liquor for consumption on or off the premises. This is the licence held by the ordinary inn or fully licensed house. It is only granted in respect of premises of a certain annual value.

Next in importance comes the 'beerhouse licence,' under which spirits cannot be sold, but under which the holder can obtain an excise licence for the sale of beer, cider and

(a) The exceptions are sales in theatres and canteens, and on passenger boats, sales of spruce or black beer, medicated or methylated spirits, retail sales by a wine dealer or of spirits by a spirit dealer on premises exclusively used for the sale of

intoxicating liquors, and sales on special occasions, and three cases of local privilege.

(b) 10 Edw. 7, and 1 Geo. 5, c. 24.

(c) See the Finance (1909-10) Act, 1910, First Sched. C.



perry, for consumption on or off the premises. In this case also, the premises must be of a certain annual value ; but less than is required for a publican's licence. Besides these, there are, (iii) 'cider licences,' (iv) 'wine licences,' and (v) 'sweets licences,' the nature of which will be gathered from their names.

(ii) *Off-licences*.—Off-licences, which enable the holder to obtain an excise licence for sale for consumption off the premises only, may be for (i) spirits, (ii) beer, (iii) cider, (iv) wine, or (v) sweets (a).

Further, on-licences may be restricted as regards the hours or days of sale, or both.

An applicant may apply for an *early closing licence*, which requires him to close his premises an hour earlier than would otherwise be required (b), or a *six day licence*, under which his premises must be closed on the whole of Sundays (c).

An applicant who desires to sell by retail any intoxicating liquors on or off the premises must first obtain the appropriate justices' licence. He can then get from the excise authorities the corresponding excise licence, without which the sale is illegal (d). It is, therefore, necessary to explain how a justices' licence is obtained.

*The granting of justices' licences*.—A new justices' licence is granted by the licensing justices ; but is not valid until it is confirmed by the confirming authority (e). The licensing justices are, in a county, the justices acting in and for the petty sessional division (where, as is usually the case, it is also the licensing district), in a county borough the licensing committee, and in other boroughs the licensing committee or the whole body of the borough justices (f). The confirming authority is, in counties, the

(a) See the Finance (1909–10) Act, 1910, First Sched. C. (1852) 18 Q. B. 687 ; Excise Licences Act, 1825, ss. 13, 14.

(b) Licensing (Consolidation) Act, 1910, s. 59 (1). (e) Licensing (Consolidation) Act, 1910, ss. 9, 12.

(c) *Ibid.* s. 58.

(f) *Ibid.* s. 2.

(d) *R. v. Salford Overseers*

quarter sessions, and in boroughs the whole body of justices or (where there are not ten borough justices qualified to act) a joint committee consisting of three borough justices and three justices of the county (*a*). In the first fourteen days of February in every year, there is held a general annual licensing meeting of the licensing justices, at which applications for the grant of new licences and for the renewal of old licences are heard (*b*).

If the licensing authority grants a licence, the applicant must, after an interval of not less than twenty-one days, apply to the confirming authority for confirmation of the licence; and, on that application, any person who has opposed the grant before the licensing authority, and no other person, may oppose the confirmation (*c*).

The discretion of the justices as regards the granting of *new* licences is an absolute discretion, to be exercised, not capriciously, but on reasonable grounds, for the good of the neighbourhood (*d*). In granting new on-licences, the justices may attach conditions, both as to the payments to be made, and the tenure of the licence, and as to other matters, as they think proper in the interests of the public; and they must attach a condition securing to the public any monopoly value which is represented by the difference between the value which the premises will, in their opinion, bear when licensed and the value if not licensed (*e*).

*Duration and Renewal of Licences.*—Off-licences can be granted for one year only; and, at the end of that period, expire unless they are renewed (*f*). But the justices may, if they think fit, grant a new *on-licence* for a term not exceeding seven years; and such a licence does not require renewing during the term (*g*). Subject to the

(*a*) Licensing (Consolidation) *field* [1891] A. C. 173.  
Act, 1910, ss. 2, 4.

(*b*) *Ibid.* ss. 9, 10.

(*c*) *Ibid.* s. 13.

(*d*) *Ibid.* s. 9; *Sharp v. Wake-*

(*e*) Act of 1910, s. 14.

(*f*) *Ibid.* s. 41.

(*g*) *Ibid.* s. 14 (2).

qualification that justices cannot refuse to renew a licence without hearing evidence on oath in support of an objection duly preferred to such renewal (a), the justices have an absolute discretion to refuse the renewal of any licence, except:—(i) an old off-licence; (ii) an old on-licence; and (iii) an old beerhouse licence. An old off-licence is an off-licence for the sale of wines, spirits, &c., which was in force on the 25th of June, 1902; and an old on-licence is a justices' licence for the sale of intoxicating liquor (other than wine alone, or sweets alone), which was in force on the 15th of August, 1904, and has been since renewed. Old beerhouse licences are justices' old on-licences for the sale of beer or cider, which were granted in respect of premises for which a corresponding excise licence was in force on the 1st of May, 1869. In the case of all these licences, the discretion of the justices to refuse renewal is limited to certain grounds (b).

(i) A renewal of an old off-licence may be refused on one of the grounds specified in the Second Schedule to the Licensing (Consolidation) Act, 1910, and on no others (c). These grounds are: (a) the bad character of the applicant, (b) disorderly character of the house, and (c) misconduct in the management of the business.

(ii) In the case of any old on-licences (not being old beerhouse licences) the justices can only (d) refuse to renew—(a) on the ground that the premises are ill-conducted or structurally deficient, or (b) on grounds connected with the character or fitness of the proposed licensee, or (c) on the ground that the renewal would be void (e).

(iii) An application for renewal of an old beerhouse licence can only be refused by the licensing justices on one

(a) The objection may be made by the justices themselves. ( <i>R. v. Howard</i> [1902] 2 K. B. 363; <i>Raven v. Southampton J.J.</i> [1904] 1 K. B. 430.)	2nd Sched. (c) <i>Ibid.</i> s. 17. (d) <i>R. v. Dodds</i> [1905] 2 K. B. 40. (e) Act of 1910, s. 18, and 2nd Sched.
(b) Act of 1910, ss. 16, 18, and	

of four grounds, which are briefly : (a) unsatisfactory character of the applicant ; (b) bad character of the house ; (c) previous forfeiture of licence by applicant for misconduct ; and (d) legal disqualification (a).

Should the licensing justices, in the case of any of the above old on-licences, be of opinion (b) that the renewal of the licence requires consideration on other grounds, they must refer the matter to the compensation authority, *i.e.* in a county to the quarter sessions, in a county borough to the whole body of justices (c). This body (d) may, after giving the persons interested an opportunity of being heard, refuse (e) the renewal of any licence so referred to them ; subject to the payment of compensation (f). The compensation so payable to those interested (g) in the licence, is paid from a fund raised by a charge (h) on all premises holding any of the licences to which the Act applies, in the county or county borough in which the premises, in respect of which the renewal of the licence was refused, are situate.

Besides the annual licensing meeting, the justices hold

(a) Act of 1910, s. 18 and Sched. II. Part I. Before 1869, these licences could be obtained from the excise officers only ; with the result that no control could be exercised over the holders of them. In 1869, the legislature made it necessary for a person desiring to obtain such an excise licence to obtain a certificate from the justices, to be granted in like manner as an alehouse licence, under the Act of 1828. Recognising, however, vested interests, the legislature enacted that no on-licence for a beer-house which existed on May 1st, 1869, nor any off-licence, should have the renewal thereof refused save on four specified grounds ; thus limiting the absolute dis-

cretion that existed in the case of ale-house licences. This privileged position for " ante-1869 " beer-house licences is still recognised in the Act of 1910.

(b) *R. v. Tolhurst* [1905] 2 K. B. 478 ; *Leeds Corporation v. Ryder* [1907] A. C. 420.

(c) Act of 1910, s. 18 (1).

(d) *R. v. Cheshire JJ.* [1906] 1 K. B. 362.

(e) *R. v. Southampton JJ.* [1906] 1 K. B. 446, 500 ; *Morgan v. Aylesford* [1906] 1 K. B. 437.

(f) Licensing (Consolidation) Act, 1910, ss. 20, 21.

(g) *Law Guarantee v. Mitcham* [1906] 2 Ch. 98.

(h) *Smith v. Dodsworth* [1906] 1 Ch. 799.

from time to time *transfer sessions* at which they may authorise the transfer of a licence from one person to another, and removals from one premises to other premises (a). They are also empowered (subject to confirmation by the confirming authority) to grant *provisional licences* to persons interested in new premises about to be constructed, or in course of construction (b).

*Actions for intoxicating liquors supplied.*—With a view also to discourage unnecessary indulgence in drink generally, it is enacted, by the Sale of Spirits Acts, 1750 and 1862, commonly known as the ‘Tippling Acts’ (c), that no action shall be maintained for a debt for spirituous liquors consumed on licensed premises, unless *bonâ fide* contracted at one time to the amount of twenty shillings and upwards; and, by the County Courts Act, 1888 (d), that no action shall be maintained for any debt for ale, porter, beer, cider, or perry consumed on the premises where the same was sold or supplied.

*Penalties on unlicensed sales of liquor and ill-conducted houses.*—The Licensing (Consolidation) Act, 1910, enacts, that if any person shall sell or expose for sale by retail any intoxicating liquor without having a justices’ licence (e) to sell, or at a place (f) where, by his licence, he is not authorised to sell, the same, he shall be liable, in the case of a first offence, to a fine not exceeding 50*l.*, or to imprisonment with or without hard labour for not more than one month (f); and, in the case of a second or other subsequent offence, the fine may be as much as 100*l.*, and the imprisonment three months to six months. On a third conviction, the offender may be disqualified from holding a licence (g). Also, if any licensed person permits

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| (a) Licensing (Consolidation) Act, 1910, ss. 22–28. | 1 K. B. 359.   |
| (b) <i>Ibid.</i> s. 33.                             | (f) <i>Walker v. Walker</i> (1904) 90 L. T. 88; <i>Strickland v. Whittaker</i> , <i>ibid.</i> 445; <i>Boyle v. Smith</i> [1906] 1 K. B. 432. |
| (c) 24 Geo. 2, c. 40; 25 & 26 Vict. c. 38.          | (g) Act of 1910, s. 65 (4). In addition to other penalties, the  |
| (d) S. 182.   |  |
| (e) <i>Barnard v. Barton</i> [1906]                 |  |

drunkenness, or any violent, quarrelsome, or riotous conduct, on his premises, or sells liquor to a drunken person (*a*), or knowingly sells any spirits for consumption on the premises to any person apparently under the age of sixteen years, or sells any intoxicating liquor to any person under the age of fourteen years, other than in corked and sealed bottles (*b*), or permits his premises to be used as a brothel (*c*), or harbours on his premises a constable on duty, or bribes or attempts to bribe any constable (*d*), or suffers gaming or unlawful games to be carried on on his premises (*e*), then for every such offence, and for some other cognate specified offences against public order, he is liable to a fine. Licence holders are also prohibited from supplying liquor to persons declared to be habitual drunkards, and are made liable, if they do so, to a fine of 10*l.* for the first offence, and of 20*l.* for any subsequent offence (*f*).

Again, the Acts contain stringent regulations, with regard to the *times* during which the sale of intoxicating liquors may be carried on (*g*); it being provided, that all premises wherein such liquors are sold by retail, if situate within the metropolitan district (that is to say, in the administrative County of London with the addition of any area within the four-mile radius from Charing Cross), must be closed on all week days, except Saturdays, from half an hour after midnight until five o'clock on the same morning; and, if situated beyond such metropolitan district, but in the metropolitan police district, or in a

offender, on his second conviction, forfeits any licence he may hold.

(*a*) Act of 1910, s. 75. If it is proved that any person has been drunk on licensed premises, it lies on the licensed person to prove "that he and the persons employed by him took all reasonable steps for preventing drunkenness on the

premises." (*Ibid.*)

(*b*) *Ibid.* ss. 67, 68.

(*c*) *Ibid.* s. 77.

(*d*) *Ibid.* s. 78.

(*e*) *Ibid.* s. 79.

(*f*) Licensing Act, 1902, s. 6.

(*g*) Licensing (Consolidation) Act, 1910, ss. 54-63, and Sched. VI.

town or place with a population of not less than one thousand (determined to be a 'populous place' by the confirming authority), must be closed between the hours of eleven at night and six on the following morning; and if situated elsewhere, then between the hours of ten at night and six on the following morning (a). On Saturday nights, the hours of closing in the metropolitan district are from midnight until one o'clock in the afternoon of the following Sunday, and on Sunday nights (including Christmas Day and Good Friday) from eleven o'clock till five on the following morning. In places beyond that district, being in the metropolitan police district, or in a 'populous place,' the hours of closing on Saturday night are from eleven o'clock until twelve-thirty p.m. (sometimes one p.m.) on the following Sunday; and on Sunday night from ten o'clock until six on the following morning. In other places, the hours of closing on Saturday night are from ten o'clock until twelve-thirty p.m. (sometimes one p.m.) on the following Sunday; and on Sunday night from ten o'clock until six o'clock on the following morning. All premises, wherever situate, must be closed on Sunday afternoon, from half-past two (in the metropolis, three) till six o'clock (b). And any person who sells (c) or exposes for sale, or keeps open any premises for the sale of, intoxicating liquors, during the times that such premises ought to be closed, or who allows, during such times, intoxicating liquors to be consumed thereon, is rendered liable to a penalty of 10*l.* for the first and of 20*l.* for any subsequent offence; unless such liquors are supplied to *bond fide* travellers, or persons lodging in the house, or, in the case of a railway station, persons arriving at or departing from such station by rail (d).

(a) *Ibid.* Sched. VI. (I).

(b) In Wales, the premises must be closed the whole of Sunday. But on Christmas Day and Good Friday, the hours are the same as in England on those

days.

(c) *Noblett v. Hopkinson* [1905] 2 K. B. 214.

(d) Licensing (Consolidation) Act, 1910, s. 61; *Taylor v. Humphreys* (1861) 10 C. B. N. S. 429;

Justices, however, have power to vary the general closing hours on Sunday (*a*); and special orders of exemption from the provisions as to closing may be granted for special occasions (*b*).

II. *Clubs*.—Before 1902, clubs were not subject to the licensing laws. When the members of a club through their committee buy a stock of wine, and supply it to the individual members as required, there is not a sale in contemplation of law; inasmuch as the member to whom it is supplied is already (jointly with the other members) owner of that which is supplied to him. Accordingly, no licence is required for clubs of that kind. In the case of proprietary clubs, however, there is a sale by the proprietor, if the liquor is bought by him and he sells it to the members. Before 1902, there was a good deal of evasion of the licensing laws by means of bogus clubs, formed for the sole purpose of supplying drink to persons who were admitted as members of the club on entering the premises. The Licensing Act, 1902, was aimed at putting an end to this abuse. Its provisions are re-enacted in the Licensing (Consolidation) Act, 1910 (*c*), by which it is enacted that every club in which any intoxicating liquor is supplied to members or their guests, must be registered with the clerk to the justices. But such registration does not constitute the club licensed premises, or render legal any sale of intoxicating liquor which would otherwise be illegal. In an unregistered club, intoxicating liquor may not be sold, under heavy penalties. If a club is not conducted in good faith as a club, or there is frequent drunkenness, or there are illegal sales of intoxicating liquor on the premises, or if persons who are not members are habitually admitted merely for the purpose of obtaining drink, or are habitually admitted

*Coulbert v. Troke* (1875) 1 Act, 1910, s. 56.

Q. B. D. 1.

(*b*) *Ibid.* s. 57.

(*a*) Licensing (Consolidation) (c) Ss. 91–98.



as members without an interval of forty-eight hours between their nomination and admission, or if the supply of intoxicating liquor is not under the control of the members, or the committee appointed by the members, the club may be struck off the register by a court of summary jurisdiction, on complaint in writing made by any person (a). And if a justice of the peace is satisfied, by information on oath, that there is reasonable ground for thinking that a registered club should be struck off the register, he may grant a search warrant to a constable to enter the club (b). Otherwise there is no police supervision of registered clubs; nor does the Act in any way interfere with the hours of closing clubs, or impose upon them any of the other incidents of licensed premises.

III. *Theatres*.—The Theatres Act, 1843 (c), is the principal Act on this subject. It first repeals previous enactments as to theatres, and then proceeds to prohibit all persons from having or keeping (d) any house or other place of public resort in Great Britain, for the public performance of stage plays, including all dramatic performances which involve dialogue (e), unless they shall have either the authority of letters-patent from the Crown, or a licence from the Lord Chamberlain of the Household, or a licence granted by the council of a county or county borough (f). Covent Garden Theatre is authorised by letters-patent. The jurisdiction of the Lord Chamberlain extends to all other theatres within the parliamentary boundaries of London and Westminster, and within the boroughs of Finsbury and Marylebone, the Tower Hamlets, Lambeth, and Southwark, and also within all places where the King shall for the time being

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| (a) Licensing (Consolidation) Act, 1910, s. 95. | Q. B. D. 11.   |
| (b) <i>Ibid.</i> s. 96.                         | (e) <i>Wigan v. Strange</i> (1865)                             |
| (c) 6 & 7 Vict. c. 68.                          | L. R. 1 C. P. 175; <i>Shelley v. Bethell</i> , <i>ubi sup.</i> |
| (d) <i>Shelley v. Bethell</i> (1883) 12         | (f) Theatres Act, 1843, s. 2.                                  |

reside ; the jurisdiction of the justices (now the county and county borough councils) extends to all places beyond these limits (a). But no licence is to be granted, by either of these authorities, except to the actual and responsible manager of the proposed theatre for the time being ; and he is to give security for the due observance of such regulations as the authorities may impose. And no licence from a county council is in force in Oxford or Cambridge, or within fourteen miles of the same, without the consent of the chancellor or vice-chancellor of these universities (b). Penalties are imposed on any person who, for hire, acts, or causes to be acted, any part of a stage play, in a place (not being a patent theatre) which is not duly licensed (c). Moreover, county councils are empowered to make suitable rules for ensuring order and decency in the theatres licensed by them, and for regulating the times when they are to be open ; but these rules may be rescinded or altered by a Secretary of State. In the case of a riot, or breach of any regulation in a theatre licensed by a county council, two justices may order the same, if licensed by them, to be closed ; and the Lord Chamberlain, as to theatres licensed by him, and also as to patent theatres, may, in the case of a riot or on any public occasion whatever, order the same to be closed (d).

The Theatres Act, 1843, has also provided, that one copy of every new stage play, and of every new act, scene, part, prologue, or epilogue of a play, intended to be acted for hire at any theatre in Great Britain, shall be sent seven days previously to the Lord Chamberlain for his allowance ; and that, without such allowance, it shall not be lawful to act the same (e). The Lord Chamberlain

(a) Theatres Act, 1843, s. 3 ; Local Government Act, 1888, s. 7. A contract to perform in an unlicensed theatre is not enforceable (*Gallini v. Laborie* (1793) 5 T. R. 242).  
 (b) Theatres Act, 1843, s. 10.  
 (c) Act of 1843, s. 11.  
 (d) *Ibid.* s. 8.  
 (e) *Ibid.* s. 12.

(See, for the privileges of the universities, *R. v. Archdall* (1838) 8 A. & E. 281.)

may also forbid (under penalties in case of disobedience) the representation or performance of any stage play, or part thereof, in any theatre whatever, whenever such a course shall appear to him advisable ; whether for the preservation of good manners or decorum, or with a view to preserve the public peace (*a*).

It will be remembered, that, as stated in an earlier part of this volume, all the business of the justices in respect of the licensing of houses or other places for the public execution of stage plays, has now been transferred, by the Local Government Act, 1888, to the county council for the county or county borough ; but the county council may delegate this business to a committee, or to justices in petty sessions (*b*).

IV. *Music and Dancing*.—The Disorderly Houses Act, 1751 (as amended by the Public Entertainments Act, 1875 (*c*)), required every house, room, garden, or other place, kept in London or Westminster, or within a circuit of twenty miles, for public dancing, music, or other public entertainment of the like kind, to be licensed by the magistrates at quarter sessions, under the penalty of being deemed a ‘disorderly house’ ; and over the doors of such places, there must have been affixed and kept the words : “Licensed pursuant to Act of Parliament of the “twenty-fifth of King George the Second.” Such houses and places were not (as a general rule) allowed to be opened for the purpose of public entertainment before the hour of noon. But most of the area affected by these Acts is contained in the county of London ; and, by the Local Government Act of 1888 (*d*), the licensing of these houses within its area was transferred to the London County Council. Moreover, so far as the administrative county of Middlesex is concerned, the law upon this subject is now contained in the Music and Dancing

(*a*) Act of 1843, s. 14.

(*b*) 51 & 52 Vict. c. 41, ss. 7, 28.

(*c*) 38 & 39 Vict. c. 21.

(*d*) S. 3.

Licences (Middlesex) Act, 1894 (a), which came into operation on the 1st January, 1895. By that Act (which consolidates the previous Acts), the new superscription to be affixed over the doors of the licensed premises is: "Licensed in pursuance of Act of Parliament for" (*dancing*, or to whatever else the licence relates). In places more than twenty miles from Westminster, there is no general regulation of music and dancing. An urban authority may, however, give the justices control over places used for such purposes by adopting Part III. of the Public Health Acts Amendment Act, 1890. In many places these amusements are regulated by local Acts.

(a) 57 & 58 Vict. c. 15.

## CHAPTER XIV.

## FRIENDLY SOCIETIES AND TRADE UNIONS.

I. *Friendly Societies*.—There are several classes of mutual benefit societies which may be classed under the general heading of Friendly Societies.

1. *Friendly Societies proper*.—These mutual benefit societies are now governed by the Friendly Societies Act, 1896 and 1908, the Collecting Societies and Industrial Assurance Companies Act, 1896, and the Societies' Borrowing Powers Act, 1898. They are established to provide by voluntary subscriptions of the members, either with or without the aid of donations, for one or other of the following objects :—(i.) the relief or maintenance of the members, their families, relations, or orphan wards, during sickness or other bodily or mental infirmity, in old age (which means after the age of fifty) or in widowhood, or for the relief or maintenance of the orphan infant children of members ; (ii.) the insuring of money to be paid on the birth of a member's child, or on the death of a member, or for funeral expenses or (in the case of Jews) for living expenses during the period of confined mourning ; (iii.) the relief or maintenance of members, when on travel in search of employment, or when in distress, or in case of shipwreck or of loss of, or damage to, boats or nets ; (iv.) the endowment of members or of their nominees at any age ; or (v.) the insurance against fire, of tools or implements of trade, to the amount of fifteen pounds (a). But no such society may grant any annuity exceeding fifty-two pounds a year, or an assurance exceeding three

(a) Friendly Societies Act, 1896, s. 8 (sub-s. (1)).

hundred pounds gross sum ; (a) also, careful enactments are made to prevent abuse in insurances on the lives of children (b).

2. *Cattle Insurance Societies* are established for the insurance to any amount, against loss of neat cattle, sheep, lambs, swine, and horses, by death from disease or otherwise.

3. *Benevolent Societies*, for any benevolent or charitable purpose, as distinct from mutual purposes (c).

4. *Working Men's Clubs*, for purposes of social intercourse, mutual helpfulness, mental and moral improvement, and physical recreation.

5. *Specially Authorised Societies*, for any purpose, authorised by the Treasury as bodies to which the Act of 1896 should be extended (d).

Such being the different classes of societies which may be registered, it is to be observed that the general superintendence of all Friendly Societies is entrusted to a chief registrar and assistant registrars (termed in the Act, 'the Central Office'), a report of whose proceedings is to be laid annually before Parliament (e). No society can apply to be registered which does not consist of seven persons at the least (f) ; and every registered society is required to have a registered office (g), to appoint trustees, to submit its accounts for audit once at least in every year (h), and to send to the registrar an annual return of the receipts and expenditure, funds, and effects of the society, as well as quinquennial returns of certain particulars mentioned in the Act (i). Registered societies

(a) Act of 1896, s. 41 ; Friendly Societies Act, 1908, s. 3.

(b) Friendly Societies Act, 1896, ss. 62-67, 84 ; Children Act, 1908, s. 7.

(c) As to what is a charity, see *In re Buck* [1896] 2 Ch. 727.

(d) Trade unions may also be registered ; and the Registrar of

Friendly Societies is also the Registrar of Trade Unions. (See *post*, p. 226.)

(e) Friendly Societies Act, 1896, ss. 1-7.

(f) *Ibid.* s. 9.

(g) *Ibid.* s. 24.

(h) *Ibid.* ss. 25, 26.

(i) *Ibid.* ss. 27, 28.

are subjected to the Treasury Regulations, 1897 (14, 20). A certificate of registration given by the registrar is *prima facie* evidence of the due registration of the society ; and in case of the registrar's refusal to register, an appeal lies to the King's Bench Division (a). These societies are not incorporated bodies ; and they act through their trustees.

Several privileges are acquired by registration. Registered societies are exempt from the provisions of the Unlawful Societies Act, 1799, and the Seditious Meetings Act, 1817 (b) ; they are also entitled to partial exemption from payment of income tax (c) and exemption from the payment of certain stamp duties which would otherwise be chargeable on them in the transaction of their business (d). Any member not under the age of sixteen may (subject to the regulations of the society) cause any money payable on his death, to the extent of one hundred pounds, to be paid over to his nominee, and exercise other rights from which his infancy would, under the general law, exclude him (e) ; and upon his death intestate without making any nomination, such money (not exceeding the amount aforesaid) may be paid over to the person or persons appearing to the trustees to be entitled thereto, without the necessity for letters of administration (f). Further, the society has, to a certain extent, a preference over other creditors in the case of death, bankruptcy, or insolvency of its officers, having the money or property of the society in their possession (g).

As to the general property and funds of the society, the trustees may invest the same, subject to the Act, either in a savings bank, or in any trust security, or even in the purchase of land, or in the erection of buildings thereon,

(a) Friendly Societies Act, s. 70.  
1896, ss. 11, 12.

(b) *Ibid.* s. 32.

(c) Income Tax Act, 1853,  
s. 49 ; Revenue Act, 1889, s. 12 ;  
Finance (1909-10) Act, 1910,

(d) Friendly Societies Act,  
1896.

(e) *Ibid.* s. 56.

(f) *Ibid.* s. 58.

(g) *Ibid.* s. 35.

or upon any other security expressly directed by the society's rules, not being (unless in the case of loans to members) personal security; and all property of the society vests in the trustees thereof for the time being, for the use and benefit of the society and its members (*a*).

The Act contains also provisions to the effect, that every dispute between a member, or one claiming under him or under the rules, and the society, shall be decided in such manner as shall be directed by the rules; and shall not be removable into any court of law, though the decision, when made, may be enforced by application to the County Court of the district (*b*). This exemption does not, however, enable the domestic tribunal of the society to act in disregard of the rules of the society; and if it does so, its decision is null and void, and an action may be brought in respect of any wrongful act done under such decision (*c*). Where the rules contain no direction as to disputes, or where the decision is unreasonably delayed, application for a decision may be made either to a court of summary jurisdiction—that is, to the justices—or to the County Court (*d*). The Act contains also minute provisions regulating the secession of lodges and branches, from other branches, or from the parent or principal society, and for the dissolution of the society, and for the ascertainment and liquidation or distribution of its assets and liabilities (*e*).

By the Societies' Borrowing Powers Act, 1898, a 'specially authorised society' may (if its rules so provide) receive deposits and borrow money at interest, from its members or from other persons.

II. *Industrial and Provident Societies*.—Industrial and Provident Societies are now regulated by the Industrial

(*a*) Friendly Societies Act, 1896, s. 44; Act of 1908, s. 4; (*c*) *Andrews v. Mitchell* [1905] A. C. 78.

*In re Coltman* (1881) 19 Ch. D. 64. (*d*) Friendly Societies Act, 1896, s. 68.

(*b*) Friendly Societies Act, 1896, s. 68; Act of 1908, s. 6. (*e*) *Ibid.* ss. 78–83.



and Provident Societies Acts, 1893 to 1913. These societies, unlike Friendly Societies, are incorporated. They are societies for carrying on any industry, trade, or business (including dealings in land); the interest of any member in the shares of such a society being limited to two hundred pounds. Wealthy corporations like the Civil Service Stores Supply Association, Limited, are registered under these Acts. These societies do not share the exemptions from stamp duty and income tax enjoyed by Friendly Societies (a).

III. *Benefit Building Societies*.—These are societies established with the principal object of raising a subscription fund, by levies from the members of the society, and of making advances thereout to the members, to enable them to build or purchase dwelling-houses, or to purchase land; the advances being secured to the society by mortgage of the premises so built or purchased. The existing Building Societies Acts are those of 1874 (the principal Act), 1875, 1877, 1884, and 1894. Under these Acts, societies of this description, (their rules being duly registered as required by the Acts, and being duly certified by the registrar,) have certain special privileges and exemptions. Thus, their members enjoy the protection of limited liability, may transfer their shares without payment of stamp duties, and may procure reconveyances of the property mortgaged by them to their society, by a mere receipt for the money advanced indorsed on the mortgage deed; without incurring the expense of a formal re-conveyance (b). But a mortgage to a building society is not exempt from stamp duty; although the re-conveyance is exempt (c). These societies had originally no power to borrow (d), in the absence at least of a

(a) Statutory provisions also exist for the following societies: Loan Societies Act, 1840 (as to loan societies); Discharged Prisoners' Aid Act, 1862, and Prison

Act, 1865 (as to discharged prisoners' aid societies).

(b) Act of 1874, ss. 14, 41, 42.

(c) *Ibid.* ss. 41, 42.

(d) *Blackburn Benefit Building*

rule expressly authorising them to do so ; but a limited power of borrowing money has now been conferred upon them by the principal Act (a). All disputes between the society and its members are to be settled by the convenient and economical method provided by the Act ; being, in general, arbitration (b). Lastly, the society (which may be either a terminating or a permanent one) may be dissolved upon the happening of the event on which it is by the rules made to determine, or it may be dissolved in any manner as prescribed by its own certified rules or by the Act, or it may be wound up either voluntarily or compulsorily under the Companies (Consolidation) Act, 1908 (c).

IV. *Trade Unions* (d).—A trade union is defined as meaning any combination, whether temporary or permanent, the principal objects of which are, under its constitution, the regulation of the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or the imposing of restrictive conditions on the conduct of any trade or business ; or the provision of benefits to members (e).

It will be seen from this definition, that the two main objects of trade unions are (i.) the regulation of the relation between workmen and masters in such matters as the rate of wages and hours and conditions of work, and (ii.) provision of benefits to the members in times of sickness, in old age, and when they are out of work.

*Society's Case* (1884) L. R. 9 App. Ca. 857 ; *Ex parte Watson* (1888) 21 Q. B. D. 301.

(a) Act of 1874, s. 15.

(b) *Ibid.* ss. 34, 35 ; *Mulkern v. Lord* (1879) L. R. 4 App. Ca. 182 ; and (since the Act of 1884) *Municipal, etc., Society v. Richards* (1888) 39 Ch. D. 372.

(c) S. 291.

(d) For the principal Acts relevant hereto, see the Con-

spiracy and Protection of Property Act, 1875, the Trade Union Acts, 1871 and 1876 (34 & 35 Vict. c. 31 ; 39 & 40 Vict. c. 22) ; the Trades Disputes Act, 1906 (6 Edw. 7, c. 47) ; and the Trade Union Act, 1913 (2 & 3 Geo. 5, c. 30).

(e) Trade Union Amendment Act, 1876, as amended by ss. 1 and 2 of the Trade Union Act, 1913.

To enable them effectively to carry out the first of these objects, many trade unions have rules by which the members bind themselves to 'strike,' *i.e.* to refuse to work simultaneously if a strike is decided on in accordance with the rules of the union. An agreement of this kind was at common law unlawful and unenforceable, as being in restraint of trade; and the purposes of a trade union were regarded as unlawful in so far as they were of this kind. But the Trade Union Act, 1871, enacted (a), that "the purposes of a trade union shall not, by reason merely that they are in restraint of trade, be unlawful, so as to render void or voidable any agreement or trust"; and by the same Act (b) and the amending Act of 1876 (c), it was provided that trade unions might be registered with the Registrar of Friendly Societies, and that a registered trade union should be enabled to hold, through the medium of trustees, both real and personal property. And the trustees and officers of registered unions were made accountable for the funds of the union; and the trustees were empowered to bring or defend any action concerning the property of the union (d). Thus trade unions were given some of the characteristics of corporate bodies; though they were not incorporated (e).

Accordingly it was held in the *Taff Vale Case* (e), that a trade union had such a quasi-corporate character, that it might be sued in its registered name for torts committed by its agents. But this decision gave much dissatisfaction to trade union leaders; and by the Trade Disputes Act, 1906, it was enacted that an action against a trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, should not be entertained by any Court. Accordingly, a trade union cannot be sued for a libel published by the agents of the union on behalf of the union (f).

(a) Ss. 2-4.

(b) S. 8.

(c) S. 3.

(d) Act of 1871, s. 9.

(e) *Taff Vale Case* [1901] A. C. 426.(f) *Vacher v. London Society of Compositors* [1913] A. C. 107.

The Act of 1871, whilst legalising the purposes of trade unions, even when they were in restraint of trade, provided that no action should be brought by or against a member of a trade union whose purposes would have been unlawful at common law, to enforce directly any agreement concerning the conditions upon which the members should employ or be employed, or for any subscription or penalty to a union, on any agreement for the application of the funds of the union to provide benefits to members (a). Accordingly, such actions cannot now be brought, any more than they could before 1871 (b); but the legalising of trade unions whose purposes are in restraint of trade has enabled the Courts to interfere to protect the rights of members when they are not seeking to enforce directly any of the excepted agreements. So the Courts will restrain a trade union from applying its funds to objects other than those provided for by the rules, or for objects outside its lawful powers (c); and will restrain a trade union from excluding from the union a member expelled otherwise than in accordance with the rules (d).

Before the passing of the Act of 1913, it was unlawful for a trade union to apply its funds to the securing of Parliamentary representation, by paying election expenses and members' salaries; and rules enabling a trade union to do so were held to be *ultra vires* (e). But now, by the Act of 1913, a trade union may apply its funds "for any lawful objects or purposes for the time being authorised under its constitution." Accordingly, if the rules of a trade union, or a resolution passed as required by the Act, so permit, the funds of a trade union may be applied to political

(where the limitations, if any, to this immunity from liability for tort are discussed).

(a) S. 4.

(b) *Hornby v. Close* (1867) L. R. 2 Q. B. 153; *Russell v. Amalgamated Society of Carpenters* [1912] A. C.; *Baker v. Ingalls* [1912] 3 K. B. 106.

(c) *Yorkshire Miners v. Howden* [1905] A. C. 256; *Osborne v. Amalgamated Society of Railway Servants* [1910] A. C. 87.

(d) *Osborne v. Railway Servants Society* [1911] 1 Ch. 540.

(e) *Railway Servants Society v. Osborne* [1910] A. C. 87.

purposes. But the Act imposes restrictions on the application of funds for political purposes, by providing that such payments are to be made out of a separate fund, and that no member shall be compelled to subscribe to that fund, and that a member who does not subscribe shall not in consequence be excluded from any of the benefits of the union. Elaborate provision is made for securing that a resolution enabling the union to subscribe to political objects shall only be passed with the approval of the majority of members, voting by ballot (a).

V. *National Insurance*.—The legislature has made use of Friendly Societies and trade unions for carrying out the great scheme of national insurance initiated by the National Insurance Act, 1911 (b). The objects of that Act are summarised in the full title, wherein it is described as “An Act to provide for Insurance against Loss of Health, and for the Prevention and Cure of Sickness, and for Insurance against Unemployment, and for purposes incidental thereto.” It would be impossible to describe here in any detail the complicated machinery of this Act; and only the barest summary of its provisions will be attempted.

The general scheme of the Act is, that all persons of the age of sixteen and upwards, and under the age of seventy, who are ‘employed’ in any employment described in the first schedule to the Act (*i.e.* broadly speaking, all persons employed in manual labour, and persons employed otherwise whose rate of remuneration does not exceed 160*l.* a year) are to become insured in an ‘approved society,’ which may be a Friendly Society, or trade union, or other body of persons, corporate or unincorporate, approved by the Insurance Commissioners (c). Contributions are made weekly by means of stamps purchased from the post office, and affixed to cards by the employer. The rates

(a) Act of 1913, ss. 3–8.

(c) *Ibid.* ss. 23 to 29; and see

(b) 1 & 2 Geo. 5, c. 55, s. 14.

as to Friendly Societies, s. 75.

of contributions vary according to the sex and remuneration of the employee, person, or 'contributor'; and though the whole amount is in the first instance payable by the employer, he is entitled to deduct a certain proportion from the wages. Thus, when the remuneration exceeds two shillings and sixpence a working day, the weekly contribution is sevenpence, in the case of a man, and sixpence in the case of a woman. Of this the employer himself contributes threepence; and the remaining fourpence or threepence (as the case may be) falls on the contributor, if the employer deducts it, as he may, from the wages.

These sums are paid into a fund called the National Health Insurance Fund, together with an additional twopence a week paid out of moneys provided by Parliament in respect of each contributor (*a*).

The benefits to which insured persons become entitled are those specified in section 8 of the Act. They include 'medical benefit,' *i.e.* free medical treatment and attendance and medicines; 'sanatorium benefit,' *i.e.* treatment in sanatoria when suffering from tuberculosis; 'sickness benefit,' *i.e.* periodical payments whilst incapable of work from disease or bodily or mental disablement; 'disablement benefit,' *i.e.* payments for long-continued disease or disablement; 'maternity benefit,' when the wife of an insured person, or an insured woman, gives birth to a child (*b*); and certain additional benefits payable when the approved society has surplus funds (*c*). The rates of benefits may be reduced in certain events, *e.g.* when the insured person is under the age of twenty-one, and unmarried; and when he is in arrear with his contributions (*d*), or when he obtains compensation under the Workmen's Compensation Act, 1906, or damages at

(*a*) 1 & 2 Geo. 5, c. 55, ss. 3-7; Second Schedule, s. 54.

(*b*) *Ibid.* s. 8, and Fourth Sched., Part I.

(*c*) *Ibid.* ss. 37, 38, and Fourth Sched., Part II.

(*d*) *Ibid.* ss. 9, 10.

common law, or under the Employers' Liability Act, 1880 (*a*).

Sickness benefit, disablement benefit, and maternity benefit, are administered by and through the approved society of which the insured person is a member (*b*) ; medical and sanatorium benefit are administered through the ' Insurance Committees,' constituted for every county and county borough (*c*).

The moneys required for supplying the benefits, and for the expenses of administration, are paid out of the National Health Insurance Fund. This fund is under the control and management of a body called ' The Insurance Commissioners ' (*d*) ; and this body pays, out of the national funds, the sums required to meet expenditure properly incurred by approved societies and insurance committees for the purposes of the benefits administered by them (*e*). In order to become an ' approved society ' for this purpose, the Friendly Society, trade union, or other body seeking to take part in the administration of the Act, must fulfil the conditions laid down in the Act (*f*) ; but it is expressly provided, that ' any body of persons, corporate or unincorporate,' if it satisfies such conditions, and has a constitution of the kind authorised by the Act, may receive the approval of the Insurance Commissioners (*g*).

The machinery for administering ' unemployment benefit ' is quite distinct. Workmen employed in certain trades, known as ' insured trades,' and specified in the Sixth Schedule to the Act, are insured against unemployment. Their contributions are made, as in the case of health insurance, by the employer in the first instance, by means of stamps ; and the employer is entitled to repay himself the workman's share of the contribution ; by deducting that amount from the wages. The moneys

(*a*) 1 & 2 Geo. 5, c. 55, s. 11.

(*b*) *Ibid.* s. 14.

(*c*) *Ibid.* ss. 15, 59.

(*d*) *Ibid.* s. 57.

(*e*) *Ibid.* s. 54.

(*f*) *Ibid.* s. 23 (2).

(*g*) *Ibid.* s. 23 (1).

so received are paid into the 'unemployment fund,' which is under the control of the Board of Trade ; and additional contributions are made out of moneys provided by Parliament (a). A workman is not entitled to unemployment benefit unless he has been employed as a workman in an insured trade for not less than six weeks in the preceding five years, and unless he is capable of work but unable to obtain suitable employment (b) ; and elaborate machinery is provided for the determination of claims to unemployment benefit, and to prevent a workman from obtaining it if he has lost his employment by reason of stoppage of work due to a trade dispute, or whilst he is in receipt of sickness or disablement benefit, or within six weeks of the time when he has lost his employment through misconduct, or by having voluntarily left his employment without just cause (c).

(a) 1 & 2 Geo. 5, c. 55, ss. 84, 85, 92.

(b) *Ibid.* s. 86.

(c) *Ibid.* ss. 87-91.



## CHAPTER XV.

OF THE LAWS RELATING TO BANKS, AND ESPECIALLY OF  
THE BANK OF ENGLAND.

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BANKING is supposed to have been originally invented in the Republic of Venice ; where, so early as the year 1171, Jews were accustomed to keep benches in the market-place for the exchange of money and bills. *Banco* being the Italian for *bench*, banks may have taken their name from this circumstance. In our own country, the business of banking appears to have been originally carried on chiefly by the goldsmiths ; for we find it recited in an Act of the year 1670 (*a*), “ that several persons, being goldsmiths, and others, by taking up or borrowing great sums of money, and lending out the same for extraordinary hire or profit, have gained and acquired to themselves the reputation and name of bankers.” At a later date, in the reign of William and Mary, the project was conceived of establishing in England a national institution of the same description with the banks then already established at Genoa and Amsterdam (*b*) ; and, in 1694, an Act was passed sanctioning the creation of that great corporate body, which has become so celebrated, under the designation of ‘The Governor and Company of the Bank of England,’ or, in popular language, ‘The Bank of England.’ Many other banks, including private banks and joint-stock banks, have since been established ; not to mention the savings-banks, of which we shall also treat in this chapter.

(*a*) 22 & 23 Car. 2, c. 3.

(*b*) Its principal projector was Mr. William Paterson, a Scotch gentleman. For the early his-

tory of the bank, see *Bank of England v. Anderson* (1837) 3 Bing. N. C. 589.

The Act by which the Bank of England was established is the Bank of England Act, 1694 (a); by which Act, after empowering their Majesties to incorporate, by letters patent, 'The Governor and Company of the 'Bank of England,' and after prohibiting the corporation from buying and selling goods, lest the lieges should be oppressed by their monopolising or 'engrossing any sort of goods, wares, or merchandise' (b), it was provided and declared, that the bank might deal in bills of exchange, or in buying and selling bullion, gold, or silver, and might sell any goods whatsoever left with it in pledge and not redeemed at the time agreed upon, or within three months after, and might also sell goods, the produce of lands which it has purchased (c). And we find that, as a fact, from the time of the passing of the Act or soon afterwards, the bank began the practice, which it has ever since continued, of issuing its own notes (d). And by subsequent Acts, it was provided, that no other bank, or company in the nature of a bank, should be established by Act of Parliament in this kingdom (e); and various exclusive privileges were conferred on the Bank of England.

Subject, however, to these exclusive privileges, as the same were afterwards from time to time modified, the trade of banking has, from its first introduction, been always free, both in London and in the country. Some of the country banks have carried on business, like the Bank of England, as 'banks of issue,' that is, have made payments by their own notes; while the other country banks, and all the London banks, have made payments in cash and Bank of England notes only, and not in notes of their own.

The character of the Bank of England, and of its transactions, has always maintained an importance far greater

(a) 5 & 6 W. & M. c. 20.

(b) *Ibid.* s. 27.

(c) *Ibid.* s. 28.

(d) *Bank of England v. Ander-*

*son* (1837) 3 Bing. N. C. 653, 654.

(e) Bank of England Acts, 1696, 1741, 1872. But see Bank of England Act, 1892, s. 7.

than that of any other bank ; for, while it has carried on the business ordinarily incident to banking, such as taking deposits of money, issuing its own paper, and discounting mercantile bills, it has also been employed as a great engine of state, in circulating Exchequer or Treasury bills (*a*), in accommodating the Government with immediate advances on the credit of deferred funds, in paying the interest due to the holders of the public debt, and in assisting the Government generally, in all the great operations of finance. The bank's advances to the Government are, however, subject to the restrictions imposed by the Bank of England Act, 1819, which enacts, in conformity with an earlier regulation in that behalf (*b*), that it shall not be lawful for the bank to make advances of money to the Crown in any manner whatever, without the express and distinct authority of Parliament for that purpose first obtained. This restriction, however, does not prohibit the bank from purchasing Exchequer bills or other government securities, or from advancing, upon the credit of Exchequer bills or of Treasury bills lawfully issued, any money required to make good any quarterly deficiency in the Consolidated Fund (*c*). Deficiency advances are made by the bank, under special statutes, for the payment of discount. Moreover, it is entitled to certain allowances for managing Treasury Bills (*d*) and the public debt.

In the year 1797, owing to a temporary failure in public credit, consequent upon the war and the heavy demands made upon the bank by the Government, there was such a run upon the bank, that it was deemed necessary to relieve it for a limited period from the necessity of making payments in cash (*e*).

(*a*) See Exchequer Bills and Bonds Act, 1866, and an enormous number of earlier Acts, generally connected with the charter.

(*b*) Act of 1694, s. 30.

(*c*) Exchequer and Audit De-

partments Act, 1866, s. 12 ; Treasury Bills Act, 1877, s. 13.

(*d*) Bank Act, 1892 (55 & 56 Vict. c. 48), s. 3 ; Revenue Act, 1906 (6 Edw. 7, c. 20), s. 10.

(*e*) See 37 Geo. 3, c. 45, con-

In the year 1826, the bank was authorised to extend the circulation of its paper, by establishing banks of its own, which, though not under the immediate management of the bank directors, should be carried on by the agents of the bank, at any place or places in England where such a branch should be established (*a*) ; and in the same year, and apparently in consideration of this privilege, the bank relinquished in part its old exclusive privileges, so as to allow of the establishment of other banking companies, to wit, joint-stock banks, not carrying on business within sixty-five miles from London (*b*). But all Bank of England 'notes on demand,' issued at any of its branch banks, must be made payable in coin at the place where such notes are issued ; and though the Bank of England is not liable to pay, at any of its branches, notes not made specially payable at such branch, it is, on the other hand, bound to pay in London all notes, whether those of the Bank of England itself or of any of its branches (*c*).

The bank charter had been originally limited to determine upon twelve months' notice after 1st August, 1705 ; but this period was from time to time extended by successive Acts of Parliament, the charter being at the same time modified in various ways. And in particular, by the Bank of England Act, 1833, it was provided, that after the 1st August, 1834, until the legislature should otherwise direct, tender of a Bank of England note (expressed to be payable to bearer on demand) should be a legal tender to the amount therein expressed for all sums above five pounds, so long as the bank continued to pay, on demand, its notes in legal coin ; but, of course, such note would not be a legal tender either by the bank itself or by any of its branches (*d*). And ultimately, by the

tinued, by subsequent Acts, till  
1823.

(*a*) Country Bankers Act, 1826,  
s. 15.

(*b*) *Ibid.* ss. 1-4.

(*c*) Bank of England Act,  
1833, ss. 4, 6.

(*d*) *Ibid.* s. 6.

Bank Charter Act, 1844 (*a*), great and extensive changes in the law were introduced (*b*) ; the statute affecting not only the Bank of England, but all banks whatsoever, and its main object being to place the general currency of the country upon a sounder footing, by controlling the issue of paper money, and by preventing as much as possible those fluctuations in the currency, to which many of our commercial embarrassments have been ascribed. The provisions of this Act may now be briefly stated.

I. *As to the Bank of England.*—The bank charter was again modified and continued ; and was made determinable, on twelve months' notice, pursuant to a vote or resolution in that behalf of the House of Commons, at any time after the 1st August, 1855 (*c*), and on repayment by the Government of certain debts particularised in the Act (*d*). The Act further provided, that the issue of Bank of England notes, payable on demand, should thereafter be kept distinct from the general business of the bank ; and that, on the 31st August, 1844, the bank should transfer<sup>\*</sup> to its 'issue department' securities to the value of 14,000,000*l.* (including the debt due to it by the public), and also so much of the gold coin, and gold and silver bullion (*e*), then held by the bank, as should not be required by its 'banking department.' Thereupon, there was to be delivered out of the issue department into the banking department, such an amount of Bank of England notes as, together with those in circulation, should be equal to the aggregate amount of the securities, coin, and bullion so transferred

(*a*) 7 & 8 Vict. c. 32.

(*b*) See also Stamp Act, 1854, s. 11 ; and Bankers' Compositions Act, 1856.

(*c*) Bank Charter Act, 1844, s. 27.

(*d*) The National Debt Act, 1870 (33 & 34 Vict. c. 71), pro-

vides that the Bank of England shall continue as a corporation for the purposes of that Act until the National Debt is repaid.

(*e*) The silver bullion is not to exceed one-fourth of the gold coin and bullion (s. 3).

to the issue department; and it was further provided, that the whole amount of the bank's notes in circulation (including those delivered to the banking department) should be deemed to be issued on the credit of such securities, coin, and bullion, and that the amount of such securities was not to be increased, but might be diminished and again increased, so as not to exceed in the whole the sum of 14,000,000*l* (a). And after such transfer as just mentioned to its issue department, it was made unlawful for the Governor and Company to issue Bank of England notes, either into its banking department, or to any person whatever, save in exchange for other Bank of England notes, or gold coin, or gold or silver bullion, or securities acquired in the issue department under the provisions of the Act. The Act

(a) In the year 1857, a great commercial crisis having arisen, the bank was unable to meet the applications made to it for discounts and advances on approved securities, without exceeding the limits of issue prescribed by law. Therefore the governor and company of the bank were informed by Government, that it was prepared to propose to Parliament a bill to indemnify them in respect of such excess; and notes were accordingly issued in exchange for securities, beyond the amount limited by law. Parliament afterwards passed an Act (21 & 22 Vict. c. 1) for indemnifying the bank in that respect, and for a short suspension of so much of the Act of 1844 as limited the amount of such issue against securities. A similar crisis had occurred previously in 1847, and occurred again subsequently in the year 1866. On each of these occasions, Government informed the bank that it was prepared

to take the same course; but no actual infringement of the law took place on these occasions, as the commercial panic subsided before the bank had made issues in excess of the legal limits. What happens in a commercial crisis is this: the reserve of cash and notes in the banking department, which is the ultimate reserve of the whole banking community, becomes dangerously low: people begin to be afraid that they may not be able to get the means for carrying on their pursuits, and demand their balances; the Government gives the bank a letter, which generally quells the excitement; but, if necessary, the banking department, under the authority of the letter, transfers some of the bank's own securities to the issue department, and receives in exchange notes, with which the reserve of the banking department is replenished.

further required, that an account of the notes issued by the issue department, and of the securities, gold coin, and gold and silver bullion therein, and also of the capital stocks and deposits, money and securities in the banking department, should be transmitted weekly to the Board of Inland Revenue in a prescribed form, and be published by it in the *London Gazette*; and all persons were declared entitled to demand, from the issue department of the Bank of England, notes in exchange for gold bullion, at the rate of 3*l.* 17*s.* 9*d.* per ounce of standard gold (a).

Finally, by the Bank Act, 1892 (b)—which is to be construed as one with the Bank Charter Act, 1844,—notes of the Bank of England issued more than forty years ago, and not presented for payment, may be written off as *dead notes*, and treated as if they had never been issued; so that the bank is thereby enabled to reissue notes to the amount so written off. But the bank remains liable, on such dead notes, in case they are presented for payment. By the same Act (c), provision is made for the grant of a supplemental charter to the bank, regulating its internal affairs.

II. *As to other Banks.*—The Act of 1844 provided (d), that in future it should not be lawful for any banker to draw, accept, make, or issue any bill or note, or engagement for the payment of money, payable to bearer on demand, or to borrow, owe, or take up any money, on his bills or notes payable to bearer on demand; subject, however, to this proviso, that any banker, who, on the 6th May, 1844, was carrying on the business of a banker and was then already lawfully issuing his own notes, might continue to issue them, though, if he should become bankrupt, or cease to carry on the business, or

(a) Bank Charter Act, 1844,  
s. 4.  
(b) 44 & 56 Vict. c. 48, s. 6.

(c) S. 7.  
(d) S. 11. (*Cf. A.-G. v. Birkbeck* (1884) 12 Q. B. D. 605.)

discontinue the issue of notes, either by agreement with the Bank of England, or otherwise, his privilege in this respect was to be at an end, and incapable of revival (a). And as regards any banker continuing to issue his own notes by virtue of this proviso, the Act provided, that he should not thereafter have in circulation a greater amount of notes than the average amount which he had circulated before the Act; and further, that if any such banker ceased to issue his own notes, it should be lawful for Her Majesty in Council to authorise the Bank of England to increase the 14,000,000*l.* of securities in its issue department, in the proportion of two thirds of the amount so withdrawn from circulation (b). The Act of 1844, moreover, provided (c), that every banker (except the Bank of England) should, on the 1st of January in every year, or within fifteen days after, make a return to the Board of Inland Revenue, of the name, residence, and occupation of every member of the partnership, of the name of the firm, and of the place where the business was carried on; and the Board, on or before the 1st of March in every year, is to publish the return in some newspaper circulating in the town or county wherein such banker carries on his business.

Another Act affecting banks (other than the Bank of England) is the Companies (Consolidation) Act, 1908 (d), by which it is enacted that no company, association, or partnership, consisting of more than ten persons, shall be formed for the purpose of carrying on the business of banking, unless it is registered under that Act, or unless it is formed in pursuance of some other Act of Parliament, or of letters patent; also, that a banking company registered as 'unlimited' may convert itself into a

(a) *Prescott, Dimsdale, & Co.*  
v. *Bank of England* [1894] 1 Q. B.  
351.

(b) Bank Charter Act, 1844,  
s. 5.

(c) S. 21.

(d) 8 Edw. 7, c. 69, s. 1  
(repealing and re-enacting the  
like provisions in the Companies  
Act, 1862, as amended by the  
Companies Act, 1879).



‘limited’ one, and for that purpose may increase the nominal amount of its capital by increasing the nominal amount of its shares, with a provision that no part of such increased capital shall be capable of being called up, except in the event and for the purposes of the company being wound up (a). But a ‘bank of issue,’ registered as a limited company, is not entitled to limited liability in respect of its *notes*; the members continuing liable as to these as if it had been registered as unlimited. In the event of the bank being wound up, if the general assets are insufficient to satisfy the claims of both the note-holders and the general creditors, then the members of the banking company, after satisfying the note-holders, are to be liable to contribute, towards payment of the debts of the general creditors, a sum equal to the amount received by the note-holders out of the general assets of the company; that is to say, out of the funds available for the general creditors as well as for the note-holders (b). The Act also provides for publication, twice a year, of a statement of the financial position of every limited banking company, in the form prescribed by the Act (c).

III. *As to Savings Banks*.—These are institutions devised for the safe custody and increase of small savings (d). So far as they are regulated by special Acts of Parliament, they fall into two classes, viz.: (a) trustee savings banks (e); (b) Post Office savings banks. Both classes enjoy in common certain statutory benefits and immunities, and, subject to certain differences which naturally exist in their constitution and management, come substantially under the same law as regards investment of funds and general conduct of business.

(a) 8 Edw. 7, c. 69, ss. 57, 58, 130, are the earliest Acts referring to small savings.

(b) *Ibid.* s. 251.

(c) *Ibid.* s. 108 and Sched. I, land, prior to the year 1891, “National Security Savings Form C.

(d) 57 Geo. 3 (1817), cc. 105, Banks.”

The earlier statutes which regulated the constitution and defined the powers and privileges of these banks, were repealed, so far as regards trustee savings banks, and their provisions (with amendments) consolidated and re-enacted, by the Trustee Savings Banks Act, 1863 (*a*); and the law on this subject is now contained in the last-mentioned Act and in the subsequent Acts (some of which were amending Acts) known collectively as the Trustee Savings Banks Acts, 1863 to 1904, including the Savings Banks Act, 1904 (*b*).

These banks receive deposits of money as low as one shilling, the produce of which is to accumulate at compound interest, and the principal and interest are to be paid out to the depositors, as required; there being deducted from such produce only the necessary expenses of management. The deposits from a single depositor are not to exceed 50*l.* in all in any one savings bank year (*c*); and no fresh deposit is to be received from him, when the total amount standing to his credit reaches 200*l.* exclusive of interest (*d*). Where the sum standing in the name of any depositor exceeds 200*l.* (principal and interest included), interest is to be for the future allowed on 200*l.* only, and not on any excess (*e*). Government Stock and, as 'special investments,' certain other securities (*f*), may also be purchased by, and be credited to, the account of, the depositor; provided that his total holding of stock is never at any one time to exceed 500*l.* (*g*), and that not more than 200*l.* stock is to be credited to his account in any one savings bank year (*h*). Government life annuities up to 100*l.* a year may also be purchased by depositors.

The management of trustee savings banks is vested in a local board of management composed of trustees

(*a*) 26 & 27 Vict. c. 87.

(*e*) *Ibid.*

(*b*) 4 Edw. 7, c. 8. (Sees. 16.)

(*f*) Savings Banks Act, 1904,

(*c*) Act of 1863, s. 39; Act of s. 6 (4).

1893, s. 1.

(*g*) Act of 1893, s. 2.

(*d*) Act of 1891, s. 11.

(*h*) *Ibid.*

only, or of trustees and managers, who are invariably prohibited by the rules of the bank from receiving directly or indirectly any benefit from its funds ; and, subject to a power of making special investments if authorised by the National Debt Commissioners (*a*), they are required to remit the money deposited, with the exception of what is retained locally to meet current requirements, to the Bank of England (*b*), to an account kept in the names of the National Debt Commissioners, and denominated ‘The Fund for the Banks for Savings.’ Interest at the rate of 2*l.* 15*s.* per cent. per annum is payable half-yearly on this account to the trustees (*c*) ; the interest payable to depositors themselves being limited to 2*l.* 10*s.* per cent. per annum. Various provisions have also been made, to secure the proper management of savings banks ; an inspection committee having been appointed, to exercise certain limited powers of supervision and control, by the Act of 1891. And no savings bank is entitled to the benefits of the Act ; unless it complies with certain provisions as to audit hereafter stated (*d*). Other provisions have been made from time to time, to save expense to depositors and to simplify procedure ; and, in particular, regulations framed originally for Post Office savings banks have been adapted for use by trustee banks, so far as they relate to withdrawals from the accounts of infants and lunatics, transfers from one account to another, nominations to receive sums due to a depositor at his decease, and the payment of deposits of deceased depositors. The trustees have power to distribute the amount due to the depositor in cases where the account does not exceed 100*l.* exclusive of interest, if probate or letters of administration are not produced within a reasonable time.

(*a*) Act of 1863, s. 16 ; Act of 1891, s. 10 ; Act of 1904, s. 6.

(*b*) Act of 1863, s. 15.

(*c*) National Debt (Supplemental) Act, 1888, s. 5.

(*d*) See *post*, p. 244.

All deposits made by a married woman were, by the provisions of the consolidating Act (a), to be paid to such woman herself, unless her husband gave notice of the marriage, and required payment thereof to be made to him; but, under the Married Women's Property Acts, 1870 and 1882, any deposit in a savings bank, made after the 9th August, 1870, in the name of a married woman, or in the name of a woman who shall marry after such deposit, is to be deemed her separate property, and to be accounted for and paid over to her, as if she were an unmarried woman. Upon the same principle of convenience and economy, the Savings Banks Acts have provided, that all disputes between the trustees and managers, and any depositor or his representatives, shall be referred to the arbitrator appointed by the Acts for that purpose; and under the Savings Banks (Barrister) Act, 1876, the Registrar of Friendly Societies, in the case of all such disputes, is now the arbitrator (b).

All persons forming themselves into a society for the purpose of establishing a savings bank, are entitled to claim for it the benefit of these parliamentary provisions, upon causing their rules and regulations to be entered in a book, to be kept by one of its officers for the inspection of depositors. But no savings bank can claim the benefit of the Act, unless its rules expressly provide for the audit of its accounts by an independent auditor (c). Such auditor is to be appointed for a term not exceeding one year, but is re-eligible (d): and the Postmaster-General may defray all or any of the necessary expenses incurred in providing for such audit (e). The rules and regulations must still be certified by the barrister appointed for that purpose (f), as being in conformity with law and with the Savings Banks Acts; but the Registrar

(a) Act of 1863, s. 31.

9 A. &amp; E. 729.

(b) 39 &amp; 40 Vict. c. 52, s. 2;

(c) Act of 1863, s. 4 (6).

*R. v. Mildenhall Savings Bank*  
(1837) 6 A. & E. 952; *R. v.*  
*Northwich Savings Bank* (1839)

(d) Act of 1904, s. 1.

(e) *Ibid.* s. 2.

(f) Act of 1863, s. 4.

of Friendly Societies is now the barrister appointed for that purpose (a). Moreover, the formation of any savings bank established after the 28th July, 1863, must be sanctioned by the National Debt Commissioners (b); to whom, in some important respects, all trustee savings banks are subject (c). But it is not lawful for any trustee savings bank to purport (by its name or otherwise), that the government is responsible or liable to its depositors for the moneys deposited (d); and every such bank is now required to describe itself as a “savings bank certified “under the Act of 1863 ” (e).

*Post Office Savings Bank.*—The success of trustee savings banks induced Parliament to institute a new kind of savings bank under the management of the Post Office. The Post Office savings bank was established in the year 1861, under the Post Office Savings Bank Act, 1861 (f); and the depositors in it enjoy the advantage of the direct security of the Government for the repayment of their deposits. That Act authorises the Postmaster-General, with the consent of the Treasury, to cause his officers to receive deposits for remittance to the principal office; and to repay the same, under such regulations as shall from time to time be prescribed (g). In the case of deposits not exceeding one pound, the entry in the depositor's book is conclusive evidence of his claim to the repayment of the deposit with interest (h). In the case of larger amounts, each depositor receives from

(a) Act of 1876, s. 2.

(b) Act of 1863, s. 2.

(c) Act of 1876, s. 2; Act of 1887.

(d) Act of 1891, s. 1.

(e) *Ibid.*

(f) 24 & 25 Vict. c. 14. This statute has been since amended by the 26 & 27 Vict. (1863) c. 14; 37 & 38 Vict. (1874) c. 73; 43 & 44 Vict. (1880) c. 36; 50 & 51 Vict. (1887) c. 40; 54 & 55 Vict.

(1891) c. 21; 56 & 57 Vict. (1893)

c. 69; 4 Edw. 7, c. 8, and 8 Edw.

7, c. 8, the last of which by s. 16 gives to these statutes the collective title of Post Office Savings Bank Acts, 1861–1908.

(g) Act of 1861, s. 1.

(h) Act of 1908, s. 1. The Postmaster-General may, with the consent of the Treasury, make this provision applicable to higher amounts. (*Ibid.*)

the Postmaster-General, through the branch office at which the deposit is made, an acknowledgment of its amount, which is conclusive evidence of his claim to repayment of the amount within ten days after demand, with interest (a).

The moneys deposited in the Post Office savings bank are to be forthwith paid over to the National Debt Commissioners (b), to be by them invested in such securities as are lawful for the funds of trustee savings banks (c); and if at any time the funds so created shall be insufficient to meet the lawful claims of all depositors, the Treasury is empowered to make such deficiency good out of the Consolidated Fund (d). The Act further provides, that the accounts, both of the Postmaster-General and of the Commissioners, in respect of all moneys deposited with or invested by them respectively under the Act, shall be audited by the Comptroller-General of the Exchequer and Auditor-General of the Public Accounts (e); and that the National Debt Commissioners, in conjunction with the Postmaster-General, so far as Post Office savings banks are concerned, shall, at the close of each year, prepare and lay before Parliament a statement of the aggregate amount of the liabilities of the Government to depositors in Post Office savings banks, and to trustee savings banks and Friendly Societies, and of the securities held by the Commissioners to meet those liabilities (f). The Act contains also provisions enabling any person, who has made a deposit under it, to transfer the amount to any trustee savings bank; and for the transfer, on the other hand, of the amount due to any depositor in any trustee savings bank, to the Post Office savings bank (g). The Act of 1904 also enables the Postmaster-General to make arrangements for the transfer of sums standing to

(a) Act of 1861, ss. 2, 3, 7.

(b) *Ibid.* s. 5.

(c) *Ibid.* s. 9.

(d) *Ibid.* s. 6.

(e) *Ibid.* s. 13; Exchequer

and Audit Departments Act, 1866, s. 5; Act of 1880; and Government Annuities Act, 1882.

(f) Act of 1904, s. 9.

(g) Act of 1861, s. 10.

the credit of depositors in foreign and colonial government savings banks to the Post Office savings bank, or from the Post Office savings bank to such a government savings bank (a).

The older form of trustee savings bank has the double advantage of secrecy and celerity. Deposits may be paid out without notice. But although deposits in these banks have increased, the savings deposited with the Post Office have increased far more rapidly, and are now much larger than those in the trustee savings banks.

In connection with these institutions, it may be here noticed, that, by the Government Annuities Acts, 1853, 1864, 1882, and 1888, the National Debt Commissioners may grant to any depositor in any savings bank, or other person whom they shall think entitled to be regarded as a depositor, an immediate or deferred life annuity depending on a single life, or an immediate annuity depending on joint lives with benefit of survivorship, or depending on the joint continuance of two lives, or a sum (not exceeding 100*l.*) to be paid on the death of any person ; such powers being exercised, as far as regards insurances, solely through the medium of Post Office savings banks.

The Acts relating respectively to trustee savings banks and to the Post Office savings bank have therefore much in common ; and the regulations made or sanctioned by the Treasury thereunder present also great similarity. And the necessity of distinguishing between the provisions and regulations respectively applicable to each has been reduced by the provision of the Savings Banks Act, 1887 (b), whereby certain regulations applicable to the Post Office savings bank may be made applicable to trustee savings banks. Moreover, trustee savings banks are now placed (as regards the integrity of their management) almost as effectively under control as the Post Office savings bank necessarily is ; provision having

been made, by the Trustee Savings Banks Act, 1887 (*a*), for the appointment by the High Court of Justice, on the application of the Treasury, of a commissioner to examine into the state of the affairs of any trustee savings bank, on any *prima facie* case being made for such an examination (*b*). And by the Savings Banks Act, 1891 (*c*), inspectors of savings banks have been appointed. Provision is made for the transfer of deposits to a Post Office savings bank, in the event of the trustees determining to close a savings bank (*d*).

(*a*) 50 & 51 Vict. c. 47.

(*b*) *Ibid.* s. 2.

(*c*) S. 2.

(*d*) Trustee Savings Banks Acts, 1863, s. 3; 1891, s. 6.



## CHAPTER XVI.

OF LIMITED AND OTHER COMPANIES FORMED UNDER THE  
COMPANIES (CONSOLIDATION) ACT, 1908.

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THE general law of corporations having been considered in the first chapter of this Part; it remains to give a short outline of the law governing those corporations which are formed under the Companies (Consolidation) Act, 1908, or were formed under the earlier Companies Acts, which have been consolidated by that Act. Until 1908, the Companies Act, 1862, was the principal Act relating to the formation of joint stock companies. That Act had been amended by many later statutes, the last of which was the Companies Act, 1908. All these Acts (including the Companies Act, 1908) were repealed and re-enacted by the Consolidation Act of 1908; and the provisions of that Act now apply as well to companies formed under the Companies Acts, 1862–1908, as to those formed under the Consolidation Act itself. The Act also applies to companies formed under the Joint Stock Companies Acts, 1856 and 1857, which were repealed by the Companies Act, 1862 (*a*). The Consolidation Act of 1908 has itself been amended in some details by statutes passed in the years 1911 and 1913, respectively (*b*).

The Companies (Consolidation) Act prohibits the formation of any company, association, or partnership consisting of more than twenty persons for the purposes of carrying on any business that has for its object the acquisition of gain (or, in the case of associations formed

(*a*) Companies (Consolidation) Act, 1908, ss. 285, 286.

(*b*) *E.g.* National Insurance

Act, 1911, s. 110 (as to preferential payments), and Companies Act, 1913 ('private companies').

for carrying on the business of banking, of more than ten persons), unless it is registered as a company under the Act, or is formed in pursuance of some other Act of Parliament (such as railway companies formed under private Acts), or of letters patent, or is a mining company subject to the jurisdiction of the Stannaries Court (a).

Though more than twenty persons may not carry on business without being formed into a company, it is not necessary that there should be as many as twenty members to form a company. Any two or more persons may form themselves into a private company, and any seven or more into a public company, by subscribing their names to a *memorandum of association*, and by otherwise complying with the requirements of the Acts in respect of registration. This memorandum of association is like the charter of a company created by a charter. It contains the objects of the corporation; and beyond those objects the corporation cannot act (b).

Companies under the Act are of three kinds : (i.) limited by shares, (ii.) limited by guarantee, (iii.) unlimited.

Companies limited by shares are those in which the liability of every member of the company is limited by the memorandum of association to the amount (if any) unpaid on his shares. Companies limited by guarantee are those in which the liability of the members is limited to the amount they respectively undertake to contribute to the assets in the event of the company being wound up. In an unlimited company, the liability of the members is unlimited; just as it is in the case of an ordinary partnership (c).

Furthermore, the Act recognises 'private companies,' and gives them certain advantages over other companies. They may be registered with limited liability; but the number of members (exclusive of present and past employees of the company) must not be more than fifty. It may be as few as two. No invitation can be offered to the public

to take shares in them; and the right to transfer shares may be restricted (a). Many family businesses have been registered as private companies. Additional requirements have been imposed upon private companies by the Companies Act, 1913.

The memorandum of association *may*, in the case of a company limited by shares, and *must*, in the case of a company limited by guarantee, or unlimited, be accompanied by *articles of association*, signed by the subscribers to the memorandum of association, and prescribing such regulations for the conduct of the company as they may deem expedient (b). The articles of association regulate the internal affairs of the company, and the management and conduct of its business; whilst the memorandum regulates the name of the company, the objects for which it is founded, the business it may carry on, its capital, and the liability of members for the debts of the company.

Upon due registration, the Registrar of Joint Stock Companies, an officer appointed by, and acting under the superintendence of, the Board of Trade (c), is to certify, under his hand, that the company is incorporated; and in the case of a limited company, that it is limited (d). Thereupon the members become a body corporate, by the name contained in the memorandum of association, and capable of exercising all the functions of an incorporated company, and having perpetual succession and a common seal, with power to hold lands (e). Persons other than the

(a) Act of 1908, s. 121.

(b) *Ibid.* s. 10.

(c) *Ibid.* s. 243.

(d) As a general rule, the word 'limited' must be used by any company registering itself as one with limited liability (s. 63). An exception, however, is made by s. 20, in favour of any limited company formed to promote "commerce, art, science, religion, charity, or any other useful ob-

ject," and intending to apply its profits to the promotion of such objects, and to prohibit the payment of any dividend, which may be licensed by the Board of Trade to be registered without the addition of the word 'limited' to its name.

(e) *Ibid.* s. 16. But no company, formed for the purpose of promoting *art, science, religion, charity*, or any other like object

original members may become members of the corporation, by agreeing to become members and having their names entered on the register of members which every company is bound to keep (a). In an ordinary company, the capital of which is in shares, every shareholder is, so long as he is a shareholder, a member of the corporation. The company may issue certificates to holders of shares or stock ; and these certificates are *prima facie* evidence of the title of the member to the shares or stock (b).

At least once in every year, there must be held an *annual general meeting* of the members of the company (c) ; and extraordinary general meetings may be called at other times, for the passing of any resolutions for which such a meeting is required (d). Unless the articles of association otherwise provide, every member has one vote (e) ; but the articles commonly provide for every member having a vote in respect of each share held by him. The articles also usually provide for members who are absent from the meeting voting by proxy, and for a poll of the members being taken. Among the most important functions of the general meeting is usually that of appointing the directors. But how and when the directors are appointed, and how many there are to be, and what are their qualifications, depend on the articles, and are not regulated by statute.

To the directors is usually deputed the general management of the company. So far as the articles permit, they are the general agents of the company for carrying on its business and doing everything incidental thereto. The management of the business of the company, and the control of its property, are entrusted to them, to be employed for the benefit of the shareholders. But wide as the

(not involving the acquisition of gain by the company, or by the individual members thereof), may, without the written licence of the Board of Trade, hold more than two acres of land. (*Ibid.*

s. 19).

(a) Act of 1908, ss. 24, 25.

(b) *Ibid.* s. 23.

(c) *Ibid.* s. 64.

(d) *Ibid.* ss. 66, 67.

(e) *Ibid.* s. 67.

powers of the directors usually are, they cannot bind the company by any contract or act which is *ultra vires* of the company. They are only agents to exercise those powers and do those things which it is competent for the company to exercise and do ; and the shareholders cannot, by special resolution or otherwise, confer on them any powers which it does not itself possess (a).

The certificate of incorporation given by the Registrar is conclusive evidence, that all the requisitions as to registration have been duly complied with, and that the company is a company duly registered under the Act (b).

The share or other interest of each member of the company is personal estate, transferable in manner provided by the articles of the company (c).

When a company is being wound up, every present and past member thereof is, in proportion to his capital, liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities, and the costs, charges, and expenses of its winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves. The liability to contribute may even attach to persons who have ceased, through having disposed of their shares, to be members of the company. But no past member will be liable, if he has ceased to be a member for one year or upwards, prior to the commencement of the winding-up ; no past member will be liable, in respect of any debt or liability of the company contracted after he ceased to be a member ; no past member will be liable, unless it appears to the court before which the winding-up takes place, that the existing members are unable to satisfy the contributions required to be made by them ; and, in the case of a company limited by shares, no contributions can be required from any member

(a) *Ashbury Railway Carriage  
and Iron Co. v. Riche* (1875)  
L. R. 7 H. L. 653.

(b) Act of 1908, s. 17.

(c) *Ibid.* s. 22.

(past or present), exceeding the amount unpaid on the shares in respect of which he is liable as a present or past member, and, in the case of a company limited by guarantee, no member can be made liable beyond the amount he has undertaken to contribute (a).

It results, therefore, that in the case of a 'limited' company, the members may be made liable to the amount unpaid on the shares respectively held or once held by them, but no further (b); while, in the case of an 'unlimited' company, the liability of each member thereof remains unlimited. But with reference to the liability of the directors as distinct from the ordinary members, the memorandum of association of a limited company (either as originally framed or as subsequently altered by special resolution) may provide, that the liability of the directors, managers, or managing director thereof, shall be unlimited; in which case, each of the directors or managers will (subject to certain restrictions specified in the Act) be liable to contribute, in the event of a winding-up, as if he were a member of an unlimited company (c). And, as has been before pointed out, the shareholders in banking companies which have a note-issue, are not entitled to claim limited liability in respect of their note issue, but are liable in respect of the notes issued by the bank as if the company had been registered as unlimited (d).

There should be distinguished from the shareholders of a company, the *debenture holders*. When a company desires to borrow money, it does so by means of mortgaging or creating a charge over its property. This charge is usually of the widest character; and affects all the assets of the company. As evidence of this charge, the company hands to the owner of it (usually a trustee for

(a) Act of 1908, s. 123.

(b) *Ibid.* This protection remains even where the company is trading in a foreign country which does not recognise limited

liability (*Risdon v. Furness* [1906] 1 K. B. 49).

(c) Act of 1908, ss. 60, 61.

(d) *Ibid.* s. 251.

debenture holders) a document called a debenture. The property thus charged by debentures is protected from the outside creditors of the company (a). A debenture holder is a creditor of the company for money lent on the security of his debenture, and is not as such a member of the company. His security is generally enforced by the appointment of a receiver or manager of the property of the company, who takes over the management of the company and receives moneys coming to it on behalf of the debenture holders. In so far as the mortgage or charge given to or on behalf of the debenture holders is a mortgage or charge of definite assets belonging to the company at the time when it was given, it is a 'fixed charge,' like any ordinary security. But where it is expressed to be a charge on assets of the company generally, present and future, it is a floating charge in respect of such assets, and does not affect them at law until steps are taken to enforce the security by appointment of a receiver or otherwise (b).

The objects for which the company is established must be carefully stated in the original memorandum of association; otherwise, great difficulties may arise with regard to the power of the company to engage in various undertakings (c). Generally speaking, the company is strictly bound by its memorandum of association; but, the company may, by special resolution and with the sanction of the Court, modify its objects in certain particulars, calculated for the more advantageous conduct of the business of the company, or for its more convenient and economical management (d).

(a) See, for an illustration of this, *Salomon v. Salomon* [1897] A. C. 22. For some very important provisions respecting the registration of mortgage-debentures, and the issue of debentures generally, see ss. 93–105 of the Act of 1908.

(b) *De Beers v. British S. Africa Co.* [1912] A. C. 52.

(c) As regards the doctrine of *ultra vires* generally, see *Ashbury Carriage Co. v. Riche* (1875) L. R. 7 H. L. 653.

(d) Act of 1908, see s. 9.

The amount of the capital of the company must be specified in the original Memorandum of Association (a) ; but a limited company may, under certain restrictions, alter its share capital by *increasing* it, or converting shares into stock, or sub-dividing the shares, or cancelling shares which have not been issued (b). A company may also, subject to the confirmation of the Court, *reduce* its share capital by extinguishing or reducing the liability on any of its shares in respect of capital not paid up, or by paying off share capital which is in excess of the wants of the company, or by cancelling any capital which has been lost ; and it may, as necessary, alter its memorandum accordingly (c).

If a company becomes insolvent, any person to whom the company is indebted in a sum exceeding 50*l.* then due, and who has served on the company, by leaving the same at its registered office, a demand under his hand requiring the company to pay the debt, may, if he obtains no satisfaction within three weeks, take proceedings to have the company wound up by the Court (d) ; and such a course may also be taken by any creditor, if execution, issued on a judgment against the company obtained in his favour, is returned unsatisfied (e). The application for the winding-up order, that is to say, for a compulsory winding-up by the Court, is to be made by petition in the Chancery Division, or, in certain cases, in county court (f). The Court will generally make an order to wind up an insolvent company ; even when it seems that there is little or no chance of there being any assets for the unsecured creditors (g). The winding-up is deemed, in general, to commence with the presentation of the petition. Immediately on the winding-up order being made, the official receiver becomes the provisional liquidator of the

(a) Act of 1908, s. 2.

(b) *Ibid.* s. 41.(c) *Ibid.* s. 46.(d) *Ibid.* s. 130.(e) *Ibid.*(f) *Ibid.* s. 131.(g) *Re Crigglestone Coal Co.*  
[1906] 2 Ch. 327.



company (a) ; and he may become the permanent liquidator, *i.e.*, the person to whom the realisation and distribution of the assets of the company are entrusted. But the Court usually appoints some other person to be the liquidator ; and even the secretary of the company may be appointed, unless his conduct or that of the directors requires investigation (b). The liquidator takes into his custody all the property, effects, and things in action of the company, and deals with them by sale or otherwise as the Court shall sanction ; and generally does all such other things as may be necessary for winding up the affairs of the company and for distributing its assets (c). And the Court, in due course, proceeds to settle a list of *contributories*, or persons liable as members to contribute to the assets of the company (including past shareholders who are liable to contribute) (d), and to make *calls* on all or any of the contributories, to the extent of their liability, for payment of the sums necessary to satisfy the debts and liabilities of the company, and the costs, charges, and expenses of winding it up, and for the adjustment of the rights of the contributories amongst themselves (e). As soon as the affairs of the company have been completely wound up, the Court makes an order that the company be dissolved (f).

To this general view of the subject of winding-up, it must be added, that, whenever a company is unable to pay its debts (and in some other cases also), a petition for winding-up may be presented by the company itself, or by a contributory or contributories, as well as by a creditor or creditors, or by all or any of such parties in conjunction. But a contributory cannot petition, unless he has either held his shares for at least six months during the eighteen months preceding the presentation of the petition, or is an original allottee of his shares, or

(a) Act of 1908, s. 149.

(b) *Ibid.*(c) *Ibid.* ss. 150, 151.(d) *Ibid.* s. 163.(e) *Ibid.* s. 166.(f) *Ibid.* s. 172.

they have devolved on him through the death of a former holder, or unless the number of the shareholders has become less than seven, or, in the case of a private company, less than two (a).

There may also be a *voluntary* winding-up; where the company passes the prescribed resolution for the purpose (b). The effect of this resolution is, that a liquidator is appointed by the company itself; and the liquidator so appointed settles a list of the contributories, makes calls, and exercises all the powers given to the liquidator in a winding-up by the Court (c). From the passing of the resolution, the company must cease to carry on business, except so far as may be required for the beneficial winding-up. But its corporate state and corporate powers continue until it is dissolved (d).

The Court also may, where a company has resolved to wind up voluntarily, order that it continue to be wound up voluntarily under the supervision of the Court; and such order is called a 'supervision order' (e). But a compulsory order is, in general, preferable, for many reasons; and more especially where matters affecting the directors and officers of the company require to be investigated, or, when proceedings are to be taken against promoters and others, on the ground of any alleged fraud contained in any prospectus or notice (f).

(a) Act of 1908, s. 137.

(b) *Ibid.* s. 182.

(c) *Ibid.* s. 186.

(d) *Ibid.* ss. 183, 184.

(e) *Ibid.* ss. 199, *et seq.*

(f) *Ibid.* s. 175.

## CHAPTER XVII.

## OF THE LAWS RELATING TO THE PRESS.

THE importance of the Press in modern life is evidenced by the variety of ways in which it affects the laws of England. We have already dealt, at some length, with the subject of copyright, *i.e.*, with the right enjoyed by an author, or his assignees, to prevent the unauthorised use of his work by the press or any other agency (*a*). In a later chapter of this volume, we shall deal with the civil remedies against persons who employ the Press to spread defamatory statements about others (*b*). In the last Book of these Commentaries we shall deal with crimes relating to the Press (*c*). Here we propose to deal only with those general regulative provisions which control the operations of this great organ of social life, especially in the matter of periodical publications. For the Press is a mighty engine for good or for evil, according as it is used ; and therefore, from its very nature, it requires to be kept under due restraint.

The censorship of the Press in this country became an important function with the introduction of printing at the end of the fifteenth century ; and it was exercised originally in the Court of Star Chamber. When that court was abolished, in 1641, the like jurisdiction was repeatedly exercised by the Long Parliament ; and notably in the years 1643, 1647, 1649, and 1652 (*d*). After the Restoration, in 1660, the censorship was regulated and continued under the 14 Car. 2 (1662)

(*a*) See *ante*, vol. ii. pp. 41-58. (vol. iv., pp. 84-88).

(*b*) See *post*, bk. v. ch. i. (pp. 334-341). (*d*) Scobell, i. 44, 134 ; ii. 88, 230.

(*c*) See *post*, bk. vi. ch. iv.

c. 33; which Act expired in the year 1679, but was revived by 1 Jac. 2 (1685) c. 17, and afterwards continued by 4 W. & M. (1692) c. 24, till the year 1695; since which last-mentioned year this censorship has ceased. And although no censorship has since that year been, or is now, exercised in this country over the Press, still the Press is duly held in check by certain restrictive provisions, having for their general object to ascertain in every instance the printer and publisher of every book, newspaper, etc.; so as to make these persons amenable to the law, whenever the purpose of civil redress or of criminal justice require (a).

The restrictive provisions referred to are principally those contained in the second schedule to the Newspapers, Printers, and Reading Rooms Repeal Act, 1869. This Act repealed a great number of prior Acts, and parts of prior Acts, which were deemed to be hostile to the legitimate freedom of printing; and re-enacted those portions of such prior Acts as were deemed to impose only reasonable restrictions on the liberty of printing and of the Press. Later Acts dealing with the liberty of the Press are the Newspaper Libel and Registration Act, 1881, and the Law of Libel Amendment Act, 1888. The restrictions imposed by these three Acts are as follows.

Every person who prints any paper for hire or gain must carefully preserve and keep at least one copy of such paper; and must write or print thereon, in fair and legible characters, the name and place of abode of his employer. If he neglect to do so, or fail to produce the copy to any justice who, within the space of six calendar months, shall demand a sight thereof, he is to incur a penalty, for every such neglect or omission, of 20*l*. And, further, every person who prints any paper or book whatsoever, for publication or dispersion, must print upon the front thereof (if the same be printed upon one side only), or upon the first or last leaf of every paper or book

(a) *R. v. Hicklin* (1868) L. R. 3 Q. B. 360.

consisting of more than one leaf, in legible characters, his name and usual place of abode or business; and for neglecting to do so, he and every person publishing or dispersing, or assisting in publishing or dispersing, any paper or book printed without such particulars, forfeits, for every copy so printed, a sum not exceeding 5*l.* But in the case of books or papers printed at the University Press of Oxford, or at the Pitt Press of the University of Cambridge, the printer, instead of printing his name thereon, is merely to print the following words, “printed at the University Press, Oxford,” or “printed at the Pitt Press, Cambridge,” as the case may be. Also, the above provision with respect to the printer’s name and place of abode does not extend to any papers printed by the authority, and for the use, of either House of Parliament (*a*); or to any bank note or security for payment of money, any bill of lading, policy of insurance, letter of attorney, deed or agreement, transfer or assignment of public stock or securities, or dividend warrant thereon, or to any receipt for money or goods, or to any proceedings in any court of law or equity. And as regards the penalties imposed by the Newspapers, Printers and Reading Rooms Repeal Act, 1869, no person is to be sued but within three months after the offence; and the action is to be brought in the name of the Attorney-General or Solicitor-General.

The Newspaper Libel and Registration Act, 1881, provides (*b*) for a register of the proprietors of newspapers, to be kept by the Registrar of Joint Stock Companies; and for the registration in such register of one or more responsible ‘representative proprietors,’ where the proprietary is numerous (*c*). It also imposes (*d*) on all printers and publishers of newspapers, the duty of making

(*a*) The Newspapers, Printers, and Reading Rooms Repeal Act, 1869, Sched. II., re-enacting the Unlawful Societies Act, 1799, s.

28; and 51 Geo. 3 (1811) c. 65, s. 3.

(*b*) S. 8.

(*c*) *Ibid.* s. 7.

(*d*) *Ibid.* s. 9.

returns, to the Registrar, of various particulars, including the title of the newspaper, and the names and occupations, and places of business and of residence, of all the proprietors. For neglect to make such returns, the printer or publisher offending is made liable to a penalty not exceeding 25*l.*; and he may be summarily ordered to make the necessary returns (*a*). The penalty is recoverable before any court of summary jurisdiction, in accordance with the Summary Jurisdiction Acts (*b*). But by way of affording protection to honest printers and publishers, who are reasonably careful of what they permit to appear in the newspapers printed or published by them, it was provided by the Newspaper Libel and Registration Act, 1881, that newspaper reports of certain meetings should be privileged (*c*); and that no prosecution for a libel contained in a newspaper should be commenced without the fiat of the Director of Public Prosecutions (*d*). Both these provisions have now been repealed by the Law of Libel Amendment Act, 1888; which has placed the law relating to these matters on a more satisfactory footing. This Act protects (*e*):—(i) a report published in a newspaper of a public meeting, *i.e.*, for the purposes of the Act, “a meeting *bond fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted”; (ii) a report, published in any newspaper, of any meeting of a vestry, town council, school board, board of guardians, board or local authority formed or constituted under the provisions of any Act of Parliament, or of any committee appointed by any of the above-mentioned bodies, or of any meeting of any commissioners authorised to act by letters-patent, Act of Parliament, warrant under the royal sign manual, or other lawful warrant or authority, or of select committees

(*a*) Newspaper, etc., Act, 1881,  
s. 10.

(*b*) *Ibid.* s. 16.

(*c*) *Ibid.* s. 2.

(*d*) *Ibid.* s. 3.

(*e*) S. 4.

of either House of Parliament. In each of the above cases (i) and (ii), however, in order that the report should be privileged, the following conditions must be fulfilled :—

- (1.) The report must be fair and accurate ;
- (2.) The matter reported must not be blasphemous or indecent ;
- (3.) The matter reported must be of public concern, or the publication thereof must be for the public benefit.

Further, in the case of a report coming under head (ii) above, the public, or a newspaper reporter, must have been admitted, or given an opportunity of admission, to the meeting. The privilege may also be rebutted by proof that the report was published maliciously ; or that the defendant has, after request, refused or neglected to insert in his newspaper a reasonable letter or statement by way of contradiction or explanation of such report.

The Law of Libel Amendment Act, 1888, also protects (a) a fair and accurate report in any newspaper of proceedings publicly heard before any court exercising judicial authority ; provided such report is published contemporaneously with such proceedings. The better opinion appears to be, that this last provision is merely declaratory of the common law, which has always protected a fair and accurate report of judicial proceedings, by whomsoever published. The report will, however, not be protected if it can be shown that it was published maliciously ; and there is no privilege for the publication of blasphemous or indecent matter.

It should be noticed that, by the common law, a fair and accurate report of parliamentary proceedings is on the same footing as a fair and accurate report of judicial proceedings, *i.e.*, it is protected unless it can be shown that it was published maliciously (b). But, by the

(a) S. 3.

(b) *Wason v. Walter* (1868) L. R. 4 Q. B. 73.

Parliamentary Papers Act, 1840 (*a*), the publication of any reports, papers, votes, or proceedings of either House of Parliament, by the order or under the authority of that House, is now absolutely protected ; and so is the republication of such matter in full.

The Law of Libel Amendment Act, 1888, also provides (*b*), that no prosecution for any newspaper libel shall be commenced, without the order of a judge at chambers first had and obtained for the purpose, on due notice to the proposed defendant, who shall have an opportunity of being heard against the application. The Act also contains provisions (*c*) for the consolidation of actions in respect of the same, or substantially the same, libel brought by the same person against two or more defendants. Further, it enables (*d*) a defendant, in an action for a libel contained in any newspaper, to give in evidence in mitigation of damages, that the plaintiff has already recovered or brought actions for damages, or has received or agreed to receive compensation in respect of a libel or libels, to the same purport or effect as the libel for which such action has been brought.

By the Local Authorities (Admission of the Press to Meetings) Act, 1908 (*e*), representatives of the press have the right of admission to the meetings of every local authority. But a local authority may temporarily exclude such representatives from a meeting as often as may be desirable, when, in the opinion of a majority of the members of the local authority present at such meeting, expressed by resolution, in view of the special nature of the business then being dealt with or about to be dealt with, such exclusion is advisable in the public interest.

(*a*) 3 & 4 Vict. c. 9.

(*b*) S. 8.

(*c*) S. 5.

(*d*) S. 6.

(*e*) S. 1.



## CHAPTER XVIII.

## OF THE LAWS RELATING TO PROFESSIONS.

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IN most employments, the rewards resulting from success, and the discredit and failure consequent upon incompetency, afford a natural and sufficient security to the public, that they will not be undertaken without the necessary qualifications. But there are professions productive of evils so serious, when improperly exercised, and so liable at the same time to be exercised by unfit persons, as to make it proper to subject them to the restraints of legal regulation. Those callings which our law deems to be of that character, (or those at least which have especially attracted the notice of our legislature as such,) are the professions of medicine and law.

I. *The Medical Profession.*—The necessity of placing under legal supervision the practitioners both of medicine and of surgery was early acknowledged ; for, as long ago as 1511, an Act of Parliament was passed to the effect that no person should practise as a physician or surgeon without being examined and approved by the persons or bodies prescribed by the Act, the chief of whom was the bishop of the diocese in which the person lived. But the privileges of the two universities of Oxford and Cambridge were preserved by the Act (a).

(a) 3 Hen. 8, c. 11. It is singular that the words making the provisions of this Act applicable to surgeons are interlined in manuscript in the original of the Act, while a memorandum is at-

tached to it, stating that “ surgeons be comprised in the Act “ like as phisicians for like mis- “ chief of ignorant persons pre- “ suming to exercise sourgerie.”

Subsequently, by royal charter dated the 23rd September, 1518, and confirmed by statute in 1523 and 1540, a college of physicians was established and incorporated in London (a). And it was ordained that this college should choose four physicians yearly to supervise all others within London and seven miles thereof, 'as also their 'medicines and receipts'; so that such as offended should be punished with fines, imprisonment, or other means. And no person was to be at liberty to practise physic or surgery, within that area, except by the licence of the college (b). By the Act of 1540 (c), it was declared that the science of physic comprehended the knowledge of surgery as a special member and part of the same; and it was enacted that any one belonging to the College of Physicians of London might practise the science of physic in all its members everywhere throughout the realm of England. By a decision of the High Court given in 1893, it was held that, under this enactment, the science of physic includes now the knowledge of surgery, and embraces the general art of healing, whether by drugs or surgery; and that the Royal College of Physicians has, by the enactment and later statutes, a right to grant a licence to practise in both medicine and surgery (d).

The case of the surgeons is somewhat different. A company of *barbers* had been incorporated as early as 1462, by letters patent of Edward the Fourth, dated

(a) The charter of Henry 8 was subsequently confirmed by statute in 1523 (14 & 15 Hen. 8, c. 5); and the disciplinary powers of the College of Physicians were by that statute considerably enlarged. By certain other charters of later dates, viz., the 8th of October, 1617, and the 26th of March, 1663, the original charter of Henry 8 was further enlarged.

(b) *Rose v. Physicians' College*

(1703) 5 Bro. P. C. 553; *R. v. Askew* (1768) 4 Burr. 2186; *Collins v. Carnegie* (1834) 1 A. & E. 695.

(c) 32 Hen. 8, c. 40.

(d) *Royal College of Physicians v. General Medical Council* (1893) 62 L. J. Q. B. 329. (See also *A.-G. v. Royal College of Physicians* (1831) 1 J. & H. 561, as to the rights of licentiates with regard to the compounding of drugs.)

24th February in that year. By the Act of 1511, as we have seen, persons were allowed to practise as *surgeons* after having been ‘examined and approved’; and by the year 1540, many ‘surgeons’ were so practising in London. In that year, these latter were incorporated by amalgamation with the barbers, under the style of the “mystery and commonalty of barbers and surgeons of London” (a); and afterwards, by a charter in their favour bearing date the 15th of August, 1629, all persons, except such physicians as therein mentioned, were prohibited from exercising, within London and Westminster or within seven miles from London, the profession of surgeon for profit, unless first duly examined and admitted by the ‘united company of barbers and surgeons of London.’ Ultimately, by a statute passed in the year 1745 (b), and two charters dated respectively the 22nd of March, 1800, and the 14th of September, 1843, The Royal College of Surgeons of England was established in its present constitution. By the last-mentioned charter, a new class of members, called ‘fellows,’ was created, from and by whom the council of the college was to be in future elected; and all future examiners were to be chosen by, and to hold their office at the pleasure of, the council. But no by-law or ordinance thereafter to be made by the council was to be of any force, until the royal approbation thereof had been signified to the college, under the hand of a Principal Secretary of State, or until it had been otherwise approved, in such manner as Parliament should direct.

There was, however, a marked distinction, in two respects, between the practice of physic and the practice of surgery, as established by the early charters and statutes. First, by an Act of Henry the Eighth passed in 1542 (c), which is still in force, some part of the earlier enactment of 1511 was in effect repealed as regards

(a) 32 Hen. 8 (1540) c. 42.

(c) 34 &amp; 35 Hen. 8, c. 8.

(b) 18 Geo. 2, c. 15.

surgeons ; and persons were permitted to heal by surgery and outward application without licence. Second, the practice of surgery alone without licence did not involve punishment by penalty or imprisonment.

The profession of *apothecaries* first obtained a charter of incorporation from James the First in 1618 ; which charter was afterwards confirmed and enlarged by the Apothecaries Act, 1815 (a). This Act entrusted to the Society of Apothecaries the execution of the provisions of the charter and the Act, and was subsequently amended, in some material respects, by the Apothecaries Act Amendment Act, 1874 (b). The general effect of the charter and Acts is, that no person may practise as an apothecary, or act as an assistant to an apothecary, in any part of England or Wales ; unless he has, after being duly examined, received a certificate of his being duly qualified in that behalf, from the Society of the Art and Mystery of Apothecaries of the City of London. And it is provided, that such a certificate shall not be granted to any person below the age of twenty-one (c), nor to any but such as have served an apprenticeship (d) of five years to some apothecary, and can produce testimonials of sufficient medical education and good moral conduct. Any person practising without a certificate is not only disabled from recovering his charges (e), but is also made liable to a penalty of 20*l.* for every offence (f). Power is also given to the society, by the Act of 1874, to strike off from the

(a) 55 Geo. 3, c. 194.

(b) 37 & 38 Vict. c. 34.

(c) Act of 1815, s. 14. (As to the certificate, see *Young v. Geiger* (1848) 6 C. B. 541.)

(d) To constitute a regular apprenticeship the contract for service must be in writing and not oral (*Kirkby v. Taylor* [1910] 1 K. B. 529).

(e) Act of 1815, s. 21 ; *Brown v. Robinson* (1824) 1 Car. & P.

264 ; *The Apothecaries' Company v. Greenwood* (1831) 2 B. & Ad. 709 ; *Leman v. Fletcher* (1873) L. R. 8 Q. B. 319 ; *Pharmaceutical Society v. London, etc., Supply Association* (1880) L. R. 5 App. Ca. 857 ; *Howarth v. Brearley* (1887) 19 Q. B. D. 303. And see the remarks of COTTON, L.J., in *Davies v. Makuna* (1885) 29 Ch. D. 596.

(f) Act of 1815, s. 20.

list of its licentiates any person who shall be convicted of any crime or offence, or who, after due inquiry by the General Council of Medical Education and Registration (presently to be mentioned) shall be judged to have been guilty of infamous conduct in any professional respect (a) ; and any licentiate refusing to compound or sell, or negligently or falsely compounding or selling, any medicines as directed by any prescription or order signed with the initials of any physician lawfully licensed, incurs certain penalties (b).

Moreover, the Society of Apothecaries, or any two or more persons appointed by it, and qualified as prescribed by the Act of 1815 as amended by the Act of 1874, may at all reasonable times in the daytime enter any apothecary's shop, and examine whether the medicines and drugs there kept be wholesome, and may destroy such as shall be found otherwise, and report to the society the names of such persons as shall have the same in their possession ; who are thereupon made liable to a fine of 5*l.* for the first, 10*l.* for the second, and 20*l.* for every subsequent offence (c). The Apothecaries Act, 1815, did not extend (d) to the business of a *chemist and druggist*, or to the buying, preparing, compounding, dispensing, and vending of drugs, medicines, and medicinale compounds, wholesale and retail. But, by the Pharmacy Acts, 1852, 1868, and 1869, no person (e) was permitted to assume the title of a chemist or druggist, or sell by retail or compound the *poisons* specified in the Acts ; unless he

(a) Act of 1874, s. 4.

(b) Act of 1815, s. 5.

(c) *Ibid.* s. 3.

(d) *Ibid.* s. 28.

(e) This does not prohibit the executor or administrator or the trustee of the estate of a deceased pharmaceutical chemist, or chemist and druggist, continuing the business of the deceased where the business is

conducted by a duly registered pharmaceutical chemist or chemist and druggist, and the name and certificate of qualification of such person are conspicuously exhibited (Pharmacy Act, 1868, s. 16, as extended by the Poison and Pharmacy Act, 1908 (8 Ed. 7, c. 55), s. 3 (2)).

had been examined by (a), and obtained a certificate from, and been placed on the register of, the Pharmaceutical Society of Great Britain, which was incorporated in 1843 (b).

By virtue, however, of the Poisons and Pharmacy Act, 1908 (c), a body corporate may carry on the business of a pharmaceutical chemist, or chemist and druggist; provided the business, so far as it relates to the keeping, retailing, and dispensing of poisons, is under the control and management of a superintendent who is a duly registered pharmaceutical chemist, or chemist and druggist, and whose name has been forwarded to the registrar appointed under the Pharmacy Act, 1852, and who does not act at the same time in a similar capacity for any other body corporate. When, however, the superintendent does not personally conduct the business, such business must be *bonâ fide* conducted, under the direction of the superintendent, by a manager or assistant who is a duly registered pharmaceutical chemist, or chemist and druggist; and the superintendent must be a director or member of the governing body or body corporate. The Act also requires that the name and certificate of the duly qualified pharmaceutical chemist, or chemist and druggist, by whom any such business is carried on, should

(a) By s. 4 of the Poisons and Pharmacy Act, 1908, the powers of the Pharmaceutical Society were extended to enable it to make by-laws providing for the registration, without examination, of persons holding colonial diplomas, and of qualified military dispensers, or certified assistants to apothecaries, who produce evidence, satisfactory to the Council, that they are persons of skill and knowledge.

(b) The prohibition against selling poisons without a certificate has been held to apply only to *persons*, and not to corpora-

tions or registered joint stock companies. (*Pharmaceutical, etc. v. London, etc., Association* (1880) L. R. 5 App. Ca. 857.) As to the meaning of the word 'sell,' see *Pharmaceutical Society v. White* [1901] 1 K. B. 601. See also the Pharmacy Acts Amendment Act, 1898; under which registered apprentices and students of pharmacy may become 'student-associates' of the society, and registered chemists and druggists may become members thereof.

(c) S. 3 (4).

be conspicuously exhibited ; otherwise the person carrying on such business is guilty of an offence under the Pharmacy Act, 1868 (*a*).

The Pharmacy Acts contain also provisions with regard to the sale of poisons, including poisonous substances for agricultural and horticultural purposes, generally, requiring them to be distinctly labelled as such, with the name and address of the seller (*b*) ; and the sale of arsenic in particular (unless when supplied wholesale or on a medical prescription) is subject, under the Arsenic Act, 1851, to special rules, which require certain particulars to be signed by the purchaser, stating, among other things, the purpose for which the arsenic is required. And where the purchaser is unknown to the vendor, the sale must also be made in the presence of some common acquaintance, who must also sign the particulars ; and the arsenic must, in general, be coloured with a proportionate admixture of indigo or soot.

By the National Insurance Act, 1911 (*c*), medical benefit is conferred upon insured persons to whom the Act was applicable ; and the Insurance Committees, appointed under the Act, are directed to make provision for the supply of proper and sufficient drugs and medicines. Subject to the regulations made thereunder (*d*), the Act

(*a*) S. 3 (1). A vendor of medicine putting his name over the door followed by the words 'The Pharmacy,' does not assume use or exhibit a name, title, or sign, implying that he is registered under the Pharmacy Act, 1852, or is a member of the Pharmaceutical Society (*Pharmaceutical Society of Great Britain v. Mercer* [1910] 1 K. B. 74).

(*b*) Act of 1868, s. 17 ; Act of 1908, s. 5. And see *Berry v. Henderson* (1870) L. R. 5 Q. B. 296. Labelling the bottle with the trade name under which a

duly qualified chemist carries on his business is sufficient (*Edwards v. Pharmaceutical Society of Great Britain* [1910] 2 K. B. 766). An unlicensed assistant cannot, however, sell insecticide poison without incurring a penalty (*Pharmaceutical Society v. Nash* [1911] 1 K. B. 520) ; and a bottle of a poisonous substance to be used in agriculture or horticulture requires labelling (*Pharmaceutical Society v. Jacks* [1911] 2 K. B. 115).

(*c*) 1 & 2 Geo. 5, c. 55, s. 15 (5).

(*d*) Regulations were made in

prohibits arrangements for the dispensing of medicines being made with persons other than persons, firms, or bodies corporate entitled to carry on the business of a chemist and druggist under the provisions of the Pharmacy Act, 1868, as amended by the Poisons and Pharmacy Act, 1908; and such persons must undertake that all medicines supplied by them to insured persons shall be dispensed either by or under the direct supervision of a registered pharmacist, or by a person who for three years immediately prior to the passing of the Act had acted as a dispenser to a duly qualified medical practitioner, or a public institution. But nothing in the Act is to interfere with the rights and privileges conferred by the Apothecaries Act, 1815, upon any person qualified, under that Act, to act as an assistant to any apothecary in compounding and dispensing medicines.

Until the year 1858, the three branches of the medical profession above described, namely physicians, surgeons, and apothecaries, were governed by the separate charters and statutes above mentioned; and no statutory or central body for the supervision of medical education and training existed. Long before that year, moreover, the provisions of the early Acts as to enforcement of penalties for the unlicensed practice of physic had become practically obsolete, though never repealed (*a*). The latest reported case of proceedings for enforcement of penalties incurred under the statutes of Henry the Eighth, for practising physic without a licence, seems to have been in 1829 (*b*). It therefore became necessary, towards the middle of the nineteenth century, to make

1912; but the provisions of the Act in this respect were not altered. The Third Schedule to the Regulations contains the conditions of agreement for the supply of drugs and appliances of chemists.

(*a*) See *Hunter v. Clare*, as re-

ported in (1899) 80 L. T. N. S. on p. 199 (in the arguments), for an account of the legal state of the medical profession before 1858; and *College of Physicians v. Harrison* (1829) 4 Man. & Ry. 404.

(*b*) *College of Physicians v. Harrison*, *ubi sup.*



provision for the education and examination of candidates for admission to the medical profession; and, in the year 1858, the Medical Act, 1858, was passed. This Act has since been amended by a variety of Acts passed at various times between the years 1859 and 1886; and in particular by the Medical Act, 1886.

By these Acts, a General Council of Medical Education and Registration of the United Kingdom, was established as a body corporate, with a perpetual succession and a common seal, and with capacity to hold lands for the purposes of the Acts (*a*). It consists of thirty-five members, chosen respectively by each of certain colleges, universities, and bodies, including the Royal College of Physicians of London, the Royal College of Surgeons of England, and the Apothecaries' Society of London (*b*), together with five persons nominated by the Crown (*c*), and five persons elected from time to time by the registered medical practitioners of the United Kingdom (*d*). To this General Council is entrusted the duty of carrying out a system of registration of all medical practitioners, calculated to insure their addresses and qualifications being generally known; the Register being annually printed, published, and sold to the public, under the style of 'The Medical Register.'

(*a*) Medical Act, 1862, s. 1.

(*b*) The other colleges and bodies are the Universities of Oxford, Cambridge, London, Durham, Victoria (Manchester), Birmingham, Liverpool, Leeds, Sheffield, Edinburgh, Glasgow, Aberdeen, St. Andrews, Dublin, and the University of Wales (University of Wales (Medical Graduates) Act, 1911 (1 & 2 Geo. 5, c. 43)); the Royal University of Ireland; the Royal College of Physicians of Edinburgh; the Royal College of Surgeons of Edinburgh; the Faculty of Physicians and Sur-

geons of Glasgow; the Royal College of Physicians of Ireland; the Royal College of Surgeons in Ireland; and the Apothecaries' Hall of Ireland (Act of 1886, s. 7, and subsequent Acts).

(*c*) Of these five nominated persons, three are for England, one for Scotland, and one for Ireland. (*Ibid.*)

(*d*) Of these five elected persons, three are to be elected by the medical practitioners resident in England, one by those resident in Scotland, and one by those resident in Ireland. (*Ibid.*)

Upon the Medical Register may be placed, on payment of a fixed fee, the name of any person possessed of any one or more of the qualifications specified in the Schedule A. to the Medical Act, 1858, as enlarged and amended by the Medical Acts, 1859, 1876, and 1886. These qualifications include members and licentiates of the medical colleges, and members or graduates of the universities and bodies above specified or referred to ; also, of any one who after 1858, and prior to the passing of the Medical Act, 1886, and whether a male or female (*a*), became possessed of one or other of such qualifications, or who, since the last-mentioned Act, has acquired the statutory qualification. For, by the Medical Act, 1886, it is provided that no person shall be registered in respect of any of the aforesaid qualifications, unless he has passed an examination (called the ‘qualifying examination’) by the Act prescribed (*b*) ; being an examination in medicine, surgery, and midwifery, held by any of the examining bodies in the Act appointed, before inspectors (*c*), and with or without the aid of assistant examiners (*d*). A separate list in the Register is appropriated to colonial and foreign practitioners who hold diplomas granted by medical authorities in the King’s dominions beyond the seas, and foreign countries, which are recognised by the General Medical Council, or (on appeal) by the Privy Council, in the manner provided by the Act (*e*). In the case of those who derive their medical qualifications from countries where British diplomas are recognised, reciprocal advantages are (subject to certain restrictions) accorded to them in the United Kingdom (*f*). The General Medical Council is subject to the supervision

(*a*) Act of 1876, s. 1.

(*b*) Act of 1886, s. 2.

(*c*) *Ibid.* s. 3.

(*d*) *Ibid.* s. 5.

(*e*) See *College of Physicians v. General Medical Council* (1893)

62 L. J. Q. B. 329, which decides

that that college has power by itself to grant a diploma in medicine, surgery, and midwifery, entitling the holder to registration in the Medical Register.

(*f*) Act of 1886, ss. 11–13, 17.

of the Privy Council, as regards its execution of the various duties assigned to it by the Medical Acts.

The Privy Council acts in the exercise of its jurisdiction under the Medical Acts, by two or more Lords of the Council. An appeal from the General Medical Council is sometimes decided on the papers transmitted to the Privy Council, and is sometimes directed to be argued in the same manner as an ordinary appeal to the Judicial Committee of the Privy Council (*a*).

Such being the different classes of persons entitled to be registered, the Medical Act, 1858, provides, that none other than registered persons shall be entitled to claim the title of legally or duly qualified medical practitioners (*b*), nor to recover any charge in any court of law for any medical or surgical advice or attendance, or for the performance of any operation, or for any medicine which they have both prescribed and supplied (*c*), nor to hold any of the government or other medical appointments specified in the Act (*d*), nor to sign any certificate required by Act of Parliament to be signed by a medical practitioner (*e*). Any person who wilfully and falsely pretends to be, or takes or uses the name or title of, a physician, doctor, surgeon, general practitioner, or apothecary, or any name, title, addition, or description, implying that he is registered or recognised by law in such assumed capacity, may be summarily convicted and fined; the fine (which is not to exceed twenty pounds) being paid to the treasurer of the Council (*f*). But every person

(*a*) Act of 1886, s. 19.

(*b*) Medical Act, 1858, s. 34.  
As to *veterinary* surgeons, see the  
Veterinary Surgeons Act, 1881.

(*c*) Act of 1858, s. 32. And see  
*Wright v. Greenroyd* (1861) 1  
B. & S. 758; *Turner v. Reynall*  
(1863) 14 C. B. N. S. 328; *De*  
*la Rosa v. Prieto* (1864) 16 C. B.  
N. S. 578; *Leman v. Houseley*

(1874) L. R. 10 Q. B. 66.

(*d*) Act of 1858, s. 36.

(*e*) *Ibid.* s. 37. See also the  
Factory and Workshop Act,  
1901 (1 Edw. 7, c. 22), ss. 122–  
124.

(*f*) Act of 1858, ss. 40, 42,  
43; *Ellis v. Kelly* (1860) 6 H. &  
N. 222; *Hunter v. Clare* [1899]  
1 Q. B. 635.

duly registered is entitled, according to his qualification, to practise medicine or surgery, or both, in the United Kingdom (a), and, subject to any local law, in any of His Majesty's dominions (b); and he is also entitled to recover in any court of law, with full costs of suit, reasonable charges for professional aid, advice, and visits, and the costs of any medicines or other medical or surgical appliances by him supplied to his patients (c), subject to this qualifying proviso with regard to physicians, that if a physician is a fellow of any college of physicians, the fellows of which are disentitled by by-law of the college to sue for their fees, then such by-law may be pleaded in bar to any action commenced for the recovery thereof. And, in addition to the power of recovering their charges thus expressly conferred on registered medical practitioners, the latter are also exempted, if they so desire, from serving on juries or inquests, or in the militia, or in any municipal or parochial office (d). They have, however, no privilege in respect of communications made to them whilst attending patients in a professional capacity (e).

The statutory duties of medical practitioners comprise (1) the notification of infectious diseases (f), (2) the notification of births, which devolves upon them in default of notification by any other person (g), (3) the giving of certificates of death (h), (4) the giving in certain

(a) *Davies v. Makuna* (1885) 29 Ch. D. 596; Act of 1886, s. 6.

(b) Medical Act, 1886, s. 6.

(c) *Turner v. Reynall* (1863) 14 C. B. N. S. 328. As there is a general practice among medical men not to charge the widow and children of a deceased medical man for attendance, a doctor who intends to charge in such a case must say so, in order that the patient may have the opportunity of declining his ser-

vices (*Corbin v. Stewart* (1911) 28 T. L. R. 99).

(d) Medical Act, 1858, s. 35; Juries Act, 1870.

(e) *Kingston's (Duchess) Case* (1776) 20 St. Tr. 355, 357.

(f) Infectious Disease (Notification) Act, 1889 (52 & 53 Vict. c. 72) s. 3.

(g) Births and Deaths Registration Act, 1874 (37 & 38 Vict. c. 88) s. 1.

(h) *Ibid.* s. 20 (2).

cases, of certificates of vaccination (a), and (5), as stated subsequently, medical practitioners may give certificates under the National Insurance Act, 1911, exempting persons in receipt of sickness benefit under that Act from having a distress execution levied, or ejection proceedings taken against them, whilst they are ill.

A registered medical practitioner implicitly undertakes that he is possessed of a reasonable amount of knowledge and skill for the performance of any professional task upon which he enters; and any such person who, for reward, or in the performance of a duty, either through negligence or ignorance, causes injury to the patient, is liable in damages for the consequences resulting therefrom (b). The governors of a hospital, however, are not liable for injuries alleged to be caused by physicians and surgeons, who give their services to the hospital, during an operation (c).

The General Medical Council is invested by the Medical Acts with the important power of erasing from the Medical Register, in certain specified cases, the name of a registered practitioner. This power is given in the following words:—"If any registered practitioner shall be convicted of any felony or misdemeanor, or shall, after due inquiry, be judged by the General Council to have been guilty of infamous conduct in any professional respect, the General Council may, if they see fit, direct the registrar to erase the name of such medical practitioner from the register" (d); but "the name of no person shall be erased from the register on the ground of his having adopted any theory of medicine or surgery" (e). In exercising its duties under this

(a) Vaccination Act, 1867 (30 & 31 Vict. c. 84), and 1871 (34 & 35 Vict. c. 98).

(b) *Seare v. Prentice* (1807) 8 East, 348; *Lamphier v. Phipos* (1838) 8 C. & P. 475.

(c) *Hillyer v. Governors of St.*

*Bartholomew's Hospital* [1909] 2 K. B. 820. (See also *Evans v. Liverpool Corporation* [1906] 1 K. B. 160.)

(d) Act of 1858, s. 29.

(e) *Ibid.* s. 28.

enactment, the General Council acts judicially, and is bound to, and does, under its standing orders, proceed in accordance, as far as practicable, within the rules which are observed in a court of justice (a). Infamous conduct in a professional respect by a medical practitioner has been defined by the Court of Appeal as occurring where the practitioner "has, in the pursuit of his profession, done something with regard to it which is reasonably regarded by his professional brethren of repute and competency, as disgraceful and dishonourable" (b). Instances of conduct which has been held by the General Council in decisions affirmed by the courts to be infamous in a professional respect, are:—discreditable advertising (c), 'covering' a practice carried on by an unqualified man (d), and publishing, under the disguise of a medical treatise, an indecent book (e). If the General Council, acting *bonâ fide*, and after due inquiry, has adjudged a medical practitioner to have been guilty of infamous conduct in a professional respect, the courts of justice have no jurisdiction or power to review the decision of the Council; and the publication of a report of the proceedings at an inquiry by the General Council is absolutely privileged in an action of libel (f).

The erasure of a practitioner's name from the Medical Register, under the powers above described, is usually followed by his being deprived of the qualifications held by him from the medical authorities (g), and involves, for all practical purposes, expulsion from the medical profession.

Besides its functions with reference to keeping the

(a) *Leeson v. General Medical Council* (1889) 43 Ch. D. 366.

(b) *Allinson v. General Medical Council* [1894] 1 Q. B. 750.

(c) *Ibid.* For the legal effect and conclusive character of the Council's decision, see *Clifford v.*

*Timms* [1907] 2 Ch. 236.

(d) *Leeson v. General Medical Council* (1889) 43 Ch. D. 366.

(e) *Allbutt v. General Medical Council* (1889) 23 Q. B. D. 400.

(f) *Ibid.*

(g) Act of 1858, s. 28.

register of qualified medical practitioners, the General Medical Council is also invested with the right to lay a representation before the Privy Council, if it finds that any of the bodies entitled by the Acts to hold examinations and to grant medical diplomas, attempt to impose upon any candidate for examination any obligation to adopt, or to refrain from adopting, the practice of any particular theory of medicine or surgery (*a*). And the Medical Council may require information from any such body, as to the course of study and examination which it requires from candidates, and is to represent the case to the Privy Council, if such course of study seems not such as to secure the possession of the requisite knowledge and skill. Thereupon, the Privy Council may, either for a time or altogether, deprive such body, so reported, of the power of granting qualifications (*b*). The President of the Medical Council, or any other person the Council may appoint, is also constituted the 'returning officer' for the purpose of electing the five representatives elected by the registered medical practitioners of the United Kingdom (*c*); and the President is to be chosen by the Medical Council from its own members, to hold office for a term not exceeding five years (*d*). The Medical Acts also vest in the General Medical Council the exclusive right of publishing and selling the *British Pharmacopœia* at a price to be fixed by the Treasury; such right being more extensive than ordinary copyright. The Acts also provide for the publication of new editions of the *Pharmacopœia* from time to time.

And, lastly, the Acts provide, that His Majesty may grant to the corporation of the Royal College of Physicians of London a new charter under the name of the "Royal College of Physicians of England," the acceptance of which is to operate as a surrender of all previous charters

(*a*) Act of 1858, s. 23.

(*c*) Act of 1886, s. 8.

(*b*) *Ibid.* ss. 18–21; Act of

(*d*) *Ibid.* s. 9.

1886, s. 4.

(except that granted by Henry the Eighth (*a*)), and also of all the privileges conferred by or enjoyed under the statute of 1523, above referred to, which shall be inconsistent with such new charter. They contain also provisions with regard to granting fresh charters to the Royal College of Physicians of Edinburgh, under the name of the Royal College of Physicians of Scotland, and to the Royal College of Physicians of Ireland, and to the Royal College of Surgeons of Scotland.

In treating of the medical profession, we should notice the Anatomy Act, 1832 (amended by the Anatomy Act, 1871), by which it is provided, that the executor or other person having lawful possession of the body of a deceased person, and not being intrusted with it for interment only, may permit the body of such person to undergo anatomical examination; unless in his lifetime the deceased shall have expressed, in such manner as in the Act specified, a wish to the contrary, or unless the surviving husband or wife, or other known relation of the deceased, shall object (*b*). Further, the Secretary of State for the Home Department may grant licences to practise anatomy, to any fellow or member of any college of physicians or surgeons, or to any graduate or licentiate in medicine, or to any person lawfully qualified to practise medicine in any part of the United Kingdom, or to any professor or teacher of anatomy, medicine, or surgery, or to any student attending any school of anatomy; the application for such licence being countersigned by two justices of the peace. And persons so licensed may receive or possess for anatomical examination, or examine anatomically, under such licence, any dead body. But no anatomical examination is to be conducted, save at some place of which the Secretary of State has had a week's notice; and the Secretary of State may appoint inspectors for all such places, who are to make quarterly

(*a*) 14 & 15 Hen. 8, c. 5 (see  
*ante*, p. 266).

(*b*) *R. v. Feist* (1858) 27  
L. J. M. C. 164.



returns, as to the dead bodies carried in for examination there.

As has been said in a former chapter (*a*), medical treatment and attendance, including the provision of proper and sufficient medicines, in the Act called 'medical benefit,' are conferred upon insured persons by the provisions of the National Insurance Act, 1911 (*b*). For the purpose of administering medical benefit, every insurance committee, as constituted by the Act, is empowered to make arrangements with duly qualified medical practitioners in accordance with the regulations of the Insurance Commissioners (*c*). The insurance committee of every county, or county borough (*d*), and the advisory committee established by the Act (*e*), comprise representatives of duly qualified medical practitioners. And the medical practitioners themselves may form local medical committees for any county or county borough; and such local committees are to be recognised and consulted upon all general questions affecting medical benefits (*f*). A medical practitioner attending any insured person in receipt of sickness benefit has the power to certify to the insurance committee that the levying of any distress or execution upon any goods or chattels belonging to such insured person, and being on premises occupied by him, or the taking of any proceedings in ejectment or for the recovery of rent, or to enforce any judgment in ejectment, against such person, may endanger his life; and when such certificate has been recorded, as provided by the Act, it is not lawful, during the period named in the certificate (*g*), to levy any distress or execution, or take any such proceedings to enforce any such

(*a*) See *ante*, pp. 229–232.

(*b*) S. 8 (1) (*a*).

(*c*) Regulations were issued in 1912.

(*d*) National Insurance Act, 1911, s. 59 (2) (*c*).

(*e*) S. 58.

(*f*) S. 62.

(*g*) The certificate continues in force a week, or for such less period as therein named. It may be renewed for any period not exceeding a week, but not beyond a total period of three months (s. 68 (2)).

judgment, against the insured person (a). Any dispute as to the accuracy of the certificate is to be determined by a registrar of a county court, who may either cancel or modify the certificate, or refuse to make any order.

Lastly, we must notice the Dentists Act, 1878, by which it is provided, that, after the 1st August, 1879, no person shall be entitled to call himself a 'dentist' unless he is registered under [that Act (b), and by which a Dentists Register is established to be kept by the General Medical Council, and to be subject to the jurisdiction of that body (c). The right to registration is by the Act conferred on three classes of persons, namely: (i.) licentiates in dental surgery or dentistry of any of the medical authorities who send members to the General Medical Council (d); (ii.) the holders under certain conditions of; dental diplomas granted by recognised bodies in the King's dominions beyond the seas and foreign countries; and (iii.) persons who at the date of the Act (22nd July, 1878) were *bonâ fide* engaged in the practice of dentistry or dental surgery (e). The Act contains provisions imposing fines on the false assumption of dental titles by unregistered persons (f), and others precluding a person from recovering by legal proceedings fees or charges for dental attendances or operations, unless he is registered in the Dentists or Medical Registers (g). A private person may now proceed for

(a) National Insurance Act, 1911, s. 68 (1). *Robertson v. Hawkins* [1913] 1 K. B. 57).

(b) The words "specially qualified to practise dentistry" in s. 3 of the Dentists Act, 1878, refer to qualification by diploma, certificate, or other hall mark, and not to competence or skill; and an unregistered person may announce that he does dental work provided he does not say he does so as a dentist, or implies that he is specially qualified as a dentist (*Bellerby v. Heyworth* [1910] A. C. 377. See, however,

(c) 41 & 42 Vict. c. 33.

(d) For list of these, see *ante*, p. 273, n. (b).

(e) Dentists Act, 1878, s. 6.

(f) A company will be restrained from taking any name implying that it is registered under the Dentists Act, or that its members are persons qualified to practise dentistry (*A.-G. v. G. C. Smith, Ltd.* [1909] 2 Ch. 524).

(g) Dentists Act, 1878, ss. 3, 4, 5.

the fines, without the consent of the General Medical Council, or any branch council (a).

Colonial list and foreign lists of dentists entitled to be registered as colonial and foreign dentists are established by this Act; the persons entitled to be registered in those lists being the holders of recognised diplomas granted by foreign and colonial institutions who have fulfilled prescribed conditions of residence (b). An appeal from a refusal by the General Medical Council to recognise a foreign or colonial diploma, may be brought to the Privy Council. Owing to the difference between the courses of dental study prescribed by British medical authorities and foreign and colonial institutions, the number of the latter whose dental diplomas are recognised is very small.

The General Medical Council has power to erase from the Dentists Register the name of a dental practitioner who has been convicted of a felony or misdemeanor, or has been adjudged by the Council to have been guilty of infamous conduct in a professional respect (c). For the purposes of the exercise of this jurisdiction, the General Council appoints a committee, which holds judicial inquiries and reports the facts to the General Council (d). The name of a practitioner which has been erased from the Dentists Register may, on application to the General Medical Council, be restored to the register. A dentist's name which is erased from the Dentists Register must be erased from the list of licentiates in dentistry of the

(a) Medical Act, 1886, s. 26.

(b) Dentists Act, 1878, ss. 8, 9, 10.

(c) *Ibid.* ss. 13, 14. (See also *Clifford v. Timms* ([1907] 2 Ch. 236), dealing with conduct which is infamous or disgraceful in a professional respect. In that case, the plaintiff had joined with other

persons in forming and becoming a director of a company for the purpose of promoting the adoption of advanced American and other scientific methods of dental surgery; the company employing unregistered assistants to perform dental operations, and advertising extensively.)

(d) *Ibid.* s. 15.

medical authority of which the dentist was a licentiate (a). But where the diploma of a registered dentist has been revoked by the authority which conferred it, the General Medical Council cannot, without proceeding to hold an inquiry under the Dentists Act, erase the practitioner's name from the Dentists Register (b).

II. *The Legal Profession*.—We here speak of solicitors, not of barristers; inasmuch as barristers (as observed in a former volume (c)) are, in general, left to the supervision of the Inns of Court, by which they are called to the Bar, and are not made the subject of the regulations of any Act of Parliament.

The body to which, subject to the jurisdiction of the Supreme Court, or of certain judges thereof, the registration, education, and discipline, of the solicitors' branch of the legal profession are entrusted, is the Society first incorporated by royal charter in the year 1831, now called 'The Law Society' (d).

By the Solicitors Act, 1843, it is enacted, that no person shall act as a solicitor, or sue out any writ or process as such, or commence, carry on, solicit, or defend any action or other proceeding, in the name of any other person or in his own name, in any court of civil or criminal jurisdiction in England and Wales, or before any revenue commissioners, unless he shall have been admitted, enrolled, and be otherwise duly qualified to act, as a solicitor (e). Any person acting contrary to this provision is guilty of contempt of court, is incapable of recovering his fees, and is liable to a penalty of 50*l.* (f).

(a) Dentists Act, 1878, ss. 13, 14.

(b) *Ex parte Partridge* (1884) 19 Q. B. D. 467.

(c) See *ante*, vol. i. pp. 6-9; and *post*, pp. 503-508.

(d) See W. N., June 20, 1903, p. 195.

(e) Act of 1843, s. 2.

(f) Solicitors Act, 1860, s. 26. And see *R. v. Buchanan* (1846) 8 Q. B. 883; *In re Walter*

Under the Solicitors Act, 1874 (*a*), any person who wilfully and falsely pretends to be a qualified solicitor is liable to a penalty of 10*l.* for each offence, and is incapable of recovering either fees or disbursements in respect of the work done by him as a solicitor. By the Stamp Act, 1891 (*b*), which reproduces the provisions in this respect of many earlier Acts, it is provided that every person not qualified as a solicitor, nor having the other professional qualifications specified in the Act, who either directly or indirectly, for or in expectation of any fee, gain, or reward, draws or prepares any instrument relating to real or personal estate, or any proceeding in law or equity, shall incur a fine of 50*l.* The Land Transfer Act, 1897 (*c*), contains a similar provision as to instruments prescribed for use in the Land Registry. Both the last-mentioned Acts contain exceptions in favour of public officers preparing instruments in the course of their duty, and of persons employed merely as copyists; and the provision of the Stamp Act, 1891, does not apply to wills, agreements under hand only, powers of attorney, and transfers of stock containing no trust or limitation. A person may be qualified to act as a solicitor by being appointed solicitor to the City of London, the Treasury, Customs, Inland Revenue, Post Office, or other public department; or by admission and the taking out of a certificate to practise in the usual way.

To entitle a person to be admitted as a solicitor, it is, in the first place, required of him in general that, being a British subject, and having previously passed the preliminary examination in general knowledge prescribed by the Law Society, or some examination exempting therefrom, and having been duly articulated (*d*) to some practising solicitor, or

*Simmons* (1885) 15 Q. B. D. 348. stamped with an 80*l.* stamp, which cannot be impressed after execution, except on payment of penalties (Stamp Act, 1891), and must be registered with the Law Society as Registrar of Solicitors

(*a*) S. 12.

(*b*) S. 44.

(*c*) S. 10.

(*d*) The articles must be

firm of solicitors (a) in England or Wales, he shall have actually served him or them as clerk for five years (b). But a service of *four* years will suffice, if the candidate shall have passed certain prescribed examinations of the universities of Oxford, Cambridge, Dublin, Durham, London, Victoria University of Manchester, Liverpool, Leeds, Sheffield, Birmingham, or Wales, or of St. David's College, Lampeter, or of the Royal University of Ireland (formerly the Queen's University), or of any of the universities in Scotland, or of any other university or college, or educational institution which shall be specified in that behalf in accordance with the Solicitors Act, 1877 (c). And, by an Order made in June, 1913, regulations were issued whereunder any person is capable of being admitted a solicitor after a service of four years, provided he has, before entering into articles, passed the examination held by the Law Society, and referred to therein. The regulations, *inter alia*, require any person before taking such examination to attend, for one whole teaching year, the curriculum of lectures and classes at the Society's Hall, and further, that before any person can be enrolled as a student, he must either have passed the Society's preliminary examination or one of the exempting examinations mentioned in the schedule to the regulations.

A service of *three* years only is required, if the articulated clerk shall have taken a degree in arts or laws at any of the above universities (d), or if he shall have been called

(Act of 1888, s. 7). The registration fee is 5s. If not registered within six months of their date, articles may be registered subsequently; but in that case, the service under them dates from the date of registration (*Ibid.* s. 8).

(a) *In re Holland* (1872) L. R. 7 Q. B. 297.

(b) Act of 1843, s. 3; *Ex parte Moses* (1873) L. R. 9 Q. B. 1.

(c) S. 13, as amended by Judicature Act, 1881, s. 24. Particulars of the exemptions for the time being in force may be obtained on application to the Law Society.

(d) Act of 1860, s. 2; Victoria University Act, 1888; University of Wales Act, 1902; University of Liverpool Act, 1904; Leeds University Act, 1904.

to the degree of a barrister in England (*a*), or shall have been, for the term of ten years, a *bond fide* clerk to some practising solicitor (*b*), or if he shall have been admitted as a Writer to the Signet, or as a solicitor in the Supreme Courts of Scotland, or as a procurator before any of the sheriff's courts of Scotland (*c*), or as a member of the Faculty of Advocates in Scotland (*d*). And, under the Solicitors Act, 1877 (*e*), a barrister of five years' standing may, without any period of service, pass the Final Examination, and be admitted as a solicitor; provided he has procured himself to be disbarred with that intention, and has obtained the certificate of two benchers of his Inn, that he is fit to practise as a solicitor.

Secondly, in order to the clerk's admission as a solicitor, it is required of him, that he shall, before the expiration of twelve calendar months next after the date when one half of his term of service shall have expired, pass an examination in elementary law and in accounts and book-keeping, known as the Intermediate Examination (*f*). From the legal portion of this examination clerks who have obtained a law degree of an English university, of the University of Wales, or of Dublin University, or who, before entering into articles, have taken honours in the Final Honour School of Jurisprudence at Oxford or in the Law Tripos at Cambridge, are exempt (*g*). A further requirement is, that the clerk, after the termination of his service, shall have passed a Final Examination, touching his articles and service, and his fitness and capacity to practise and to be an officer of the Supreme Court. The Preliminary, Intermediate, and Final Examinations

(*a*) Act of 1860, s. 3. A barrister must first have been disbarred (*Ex parte Bateman* (1845) 6 Q. B. 853).

(*b*) *Ibid.* s. 4; *In re Sherry* (1868) L. R. 3 Q. B. 164; *Re James* (1885) 33 W. R. 654.

(*c*) *Ibid.* s. 15.

(*d*) Act of 1872 (35 & 36 Vict. c. 81).

(*e*) S. 12.

(*f*) Act of 1877, s. 5, and Regulations of the Law Society.

(*g*) Act of 1894, and Regulations of the Law Society.

are conducted by the Law Society. From the Final Examination, the only exemptions are in favour of colonial solicitors to whom the provisions of the Colonial Solicitors Act, 1900, apply (*a*), and of barristers who, having been practising solicitors, have caused their names to be struck off the rolls for the purpose of being called to the Bar, and, having practised at the Bar, desire to be readmitted on the roll of solicitors (*b*).

Upon the competency of the candidate for admission being certified, an oath used to be administered to him to the effect, "that he would truly and honestly demean himself in practice," and also the oath of allegiance. After taking such oaths, he was 'admitted,' and his name was duly enrolled; his admission being first duly written on parchment, and impressed with the proper stamp (*c*). But a simplification in the mode of admission has been effected by the Solicitors Act, 1888 (*d*), by which it was enacted that, from and after the 1st February, 1889, a candidate who has obtained from the Law Society a certificate of having passed his Final Examination, may apply to the Master of the Rolls to be admitted as a solicitor; six weeks' notice at least being given to the Law Society of intention to seek admission. Upon the expiration of such notice, the Master of the Rolls, in the absence of any cause to the contrary is, by writing under his hand, to admit the applicant to be a solicitor. On production of this admission, and on payment of a fee, not exceeding 5*l.*, to the Society, the applicant's name is entered by the Society on the roll of solicitors (*e*). The stamp duty payable on admission is 25*l.*

The Solicitors Act, 1843 (*f*), provided for the appointment of a Registrar, whose duty it should be to keep an alphabetical list or roll of all solicitors, and to issue

(*a*) 63 & 64 Vict. c. 14.

Pt. II.

(*b*) Rules under Solicitors Act, 1888, pt. iv. rr. 1-4.

(*d*) S. 10.

(*e*) *Ibid.* s. 11.

(*c*) Act of 1877, Sched. II.,

(*f*) S. 21.



certificates to practise to persons who had been duly admitted and enrolled; and the duties of this office were, by the same Act, committed to the Law Society (*a*). This roll is distinct from the admission roll formerly kept by the Clerk of the Petty Bag. By the Solicitors Act, 1888, the custody of the latter roll was transferred to the Law Society (*b*); and both rolls are now kept by the society in its capacity of Registrar of Solicitors.

After a solicitor is admitted, and before he can practise, he must obtain from the Registrar a certificate which, when stamped with the proper duty, authorises him to practise as a solicitor for one year ending 15th November (*c*). To obtain the Registrar's certificate, a declaration in writing, signed by the solicitor or by his partner, or by his London agent, containing his name and address, and the date of his admission, must be delivered to the Registrar (*d*). A solicitor who practises without having a stamped certificate for the current year incurs certain penalties, and is incapable of maintaining any action to recover his professional charges or disbursements (*e*). Formerly, if the certificate was not renewed yearly, then, after the lapse of one year, it was not renewable without an order of the Master of the Rolls; but under the Solicitors Act, 1888 (*f*), the Law Society, as Registrar of Solicitors, may grant a renewal, or (subject to appeal to the Master of the Rolls by petition supported by affidavit of the facts) refuse to grant a fresh certificate. In the latter case, the Master of the Rolls may either refuse to interfere, or may

(*a*) Act of 1843, s. 21.

(*b*) Act of 1888, s. 5.

(*c*) Act of 1843, s. 22; Act of 1860, s. 18. The stamp on the yearly certificate is regulated by the Stamp Act, 1891, as follows. If the solicitor practises within ten miles from the General Post Office, and has been admitted three years, 9*l*. (or, if he has not

been admitted three years, 4*l*. 10*s*.); if he practises elsewhere and has been admitted three years, 6*l*. (or, if he has not been so long admitted, 3*l*.).

(*d*) Act of 1843, s. 23.

(*e*) *Ibid.* s. 26; Act of 1874, s. 12; Stamp Act, 1891, s. 43.

(*f*) S. 16.

direct a fresh certificate to issue on such terms as he may think fit (a).

By the Solicitors Act, 1906, the Registrar is authorised to exercise similar powers, subject to a like appeal, whenever a solicitor who is an undischarged bankrupt applies for a practising certificate.

The Solicitors Act, 1843, also contains the following (among other) regulations:—that no solicitor shall have more than two articled clerks at one and the same time, nor any such clerk while he himself acts as a clerk; that a clerk, articled for five years to a solicitor, may serve one of those years as a pupil with a practising barrister, and another with the London agent of the solicitor to whom he is articled (b); that a clerk whose master has died or left off business during the term, or whose articles have been cancelled or discharged (c), may enter into fresh articles with another master for the residue of the term. But any resulting interval will not be allowed to count as part of his service (d).

We will now consider the law relating to solicitors who have been admitted, and have taken out their certificates, and renewed such certificates annually, and (being in all other respects duly qualified) are in actual

(a) Solicitors Act, 1888, s. 16.

(b) Act of 1843, ss. 4, 6. By the Act of 1860, s. 10, the clerk under articles is, with certain excepted cases, restricted (during his term of service) from holding any office, or engaging in any employment, other than that of clerk to his master or his master's partner. But, by the Act of 1874, s. 4, this restriction is removable; provided the consent in writing of the master be obtained, and also the sanction of one of the judges or of the Master of the Rolls. (See *Re Peppercorn* (1866) L. R. 1 C. P.

473, and the remarks of Lord COLERIDGE in *In re Greville* (1873) L. R. 9 C. P. 13.)

(c) In the event of the master becoming bankrupt, or being imprisoned for debt for twenty-one days, the court may discharge the clerk or assign his articles to a new master (Act of 1843, s. 5); and a proportion of the premium paid, may be (but, in general, is not) recoverable on the death of the master (*Ferns v. Carr* (1885) 28 Ch. D. 409).

(d) Act of 1843, s. 13; *Ex parte Wallis* (1862) 2 B. & S. 416.

practice ; and, in particular, with reference to their work, their professional remuneration, and their professional conduct.

We shall thus consider, although with great brevity, (A) the privileges and disabilities of solicitors ; (B) their retainer, the duties of their employment, and their liability for negligence ; (C) their bills of costs and remuneration generally ; (D) the remedies, for and against solicitors in respect of costs ; and (E) discipline over solicitors.

A. *The privileges and disabilities of solicitors.*—Solicitors being in actual practice are exempted from serving on juries (*a*), or as parish overseers, churchwardens, constables, and the like (*b*), and generally from all public services of a personal character which might interfere with the due discharge of their professional duties. But whereas formerly a solicitor was incapable of being a county justice (*c*), his disability in this respect has now been taken away (*d*). Solicitors are entitled to practise as solicitors before the Privy Council and the House of Lords, in the Court of Appeal and in the High Court ; and to practise either as solicitors or as advocates, or as both, in the Bankruptcy Division of the High Court (*e*), in the ecclesiastical courts, in the county courts (*f*), and generally in the inferior courts. They may practise also as solicitors in the court of the county palatine of Lancaster (*g*).

(*a*) Juries Act, 1870 (33 & 34 Vict. c. 77), s. 9 ; *In re Dutton* [1892] 1 Q. B. 486.

(*b*) Parish Constables Act, 1842, s. 6.

(*c*) Solicitors Act, 1843, s. 33.

(*d*) Justices of the Peace Act, 1906, s. 3.

(*e*) Bankruptcy Act, 1883, s. 151 ; *In re Elderton* [1887] W. N. p. 21. (But see *Doxford v. Sea Shipping Co., Limited*

(1897) 14 T. L. R. 111.)

(*f*) County Courts Act, 1888, s. 72.

(*g*) Court of Chancery of Lancaster Act, 1850, s. 27. In this court, as well as in inferior courts generally, solicitors are required to sign the roll of the court. If they do not, it is doubtful whether costs can be recovered against the other side (Solicitors Act, 1843, s. 27).

The right to practise does not necessarily carry with it the right of audience. For instance, solicitors have no right of audience before the House of Lords (although they have before the Appeal Committee of the House of Lords, from which counsel are excluded (a)), or the Privy Council, or in the Court of Appeal, or in the High Court so far as open court is concerned (except in the Bankruptcy Division), or in the Mayor's Court, London. But they have a right of audience in both the High Court and the Mayor's Court, so far as chambers are concerned; and also in a county court (b), palatine courts of Durham and Lancaster, and before coroners, and under-sheriffs, in arbitration proceedings, income tax appeals, and licensing matters, and, to a limited extent, before courts martial. There is another tribunal (viz. the Revising Barrister's Court) before which solicitors have a right of audience which is denied to counsel (c). With regard to quarter sessions, the justices have the same discretion as is enjoyed by every other court to regulate their own proceedings (d); although, under the Summary Jurisdiction Act, 1848 (e), both solicitors and barristers have a right of audience before them on a complaint or information. A solicitor who is a managing clerk to another solicitor has not the right to appear for, and represent, his principal in the conduct of a case (f); but with leave he may do so.

(a) Directions for Agents in House of Lords, No. 20.

(b) As to the duties of solicitors practising in county courts, see *Davies v. Coles and Mowlam* (1911) 132 L. T. Jo. 577.

(c) Parliamentary Voters Registration Act, 1843, s. 41.

(d) *Collier v. Hicks* (1831) 2 B. & Ad. 663; *Re Evans* (1846) 9 Q. B. 279; *R. v. Justices of London* [1896] 1 Q. B. 659.

(e) S. 12.

(f) *R. v. Judge of the County Court of Oxfordshire* [1894] 2 Q. B. 440. (In the recent case of *Butterworth v. Butterworth and Queenam* (1913) 57 Sol. Jo. 266, in the absence of the counsel and solicitor, the judge intimated that he would have permitted the solicitor's clerk to have conducted the case had he been an admitted solicitor.)

Solicitors are privileged from arrest on civil process, while attending the courts in their capacity of solicitors, and while going to and returning from the same (a); but they are not privileged from arrest on criminal process, or under a writ of attachment, or order of committal for contempt (b).

B. *The retainer of solicitors, the duties of their employment, and their liability for negligence.*—The solicitor of a party litigant should, as a general rule, obtain from his client a written authority to act on his behalf (c); but a verbal retainer is sufficient (d), while, as regards non-contentious business, the retainer is in general implied from the circumstances. The authority may be either a general one, or it may be an authority limited to some particular matter, or to some particular proceeding in the action; and in either case, it must not be exceeded (e). If the retainer is in a common law action, the contract is an entire contract; and the solicitor must accordingly see the business through to its end, at least as a rule, before he may sue for his remuneration (f). But a retainer in such a matter as a bankruptcy, an administration, or a winding-up, does not constitute an entire contract, so

(a) *Re Jewitt* (1864) 33 Beav. 559.

(b) *Re Freston* (1883) 11 Q. B. D. 545; *Re Dudley* (1883) 12 Q. B. D. 44.

(c) As to construing a retainer, see *Re Paine* (1912) 28 T. L. R. 201.

(d) *Wiggins v. Peppin* (1837) 2 Beav. 403. And see the remarks of CHITTY, J., in *Wray v. Kemp* (1884) 26 Ch. D. 172. A retainer in writing is, however, essential, where it amounts to an agreement not to be performed within a year (*Eley v. The Positive, etc., Assurance Co.*

(1875) 1 Ex. D. 88); or where the client's name is to be used in any action as next friend or as relator (Order XVI., r. 20). Where the client is a corporation, the retainer must, as a rule, be under seal (*Brooks v. Mayor, etc., of Torquay* [1902] 1 K. B. 601; *Lawford v. Billericay R. C.* [1903] 1 K. B. 772).

(e) But see *In re Kerly* [1901] 1 Ch. 467; and *In re White* [1902] W. N. 114.

(f) *Underwood v. Lewis* [1894] 2 Q. B. 306; *Court v. Berlin* [1897] 2 Q. B. 396.

as to deprive the solicitor of his right to payment till the whole matter is completed (a).

The death of the client before completion of the business covered by the retainer discharges the solicitor from continuing to act. He may at once withdraw from the case, and deliver his bill, in respect of costs already incurred, to the personal representatives who are responsible for its payment (b). If the personal representatives continue the action, they may be personally liable for the whole of the costs (c). If a solicitor dies during the continuance of an action, or before a matter is completed, his personal representatives will probably be entitled to recover on a *quantum meruit*. The bankruptcy of either the solicitor or the client will put an end to the retainer (d). Lunacy has the same effect also; and a solicitor who continues to conduct proceedings on behalf of a client who has become, *de facto*, of unsound mind, will be liable to be ordered to pay costs personally to the other side, on the ground of 'warranty of authority,' even though he was unaware, and had no reason to be aware, of the client's unsoundness of mind (e).

Under his general authority, the solicitor may agree to a matter in dispute being referred to an arbitrator; and may even agree to a compromise of it, unless the client has expressly forbidden a compromise (f). But the solicitor may not, before action commenced, compromise

(a) *In re Hall and Barker* (1878) 9 Ch. D. 538.

(b) Solicitors Act, 1843, s. 37; *Harris v. Osbourn* (1834) 2 Cr. & M. 629; *Whitehead v. Low* (1852) 7 Ex. 691.

(c) *Re Bentinck* (1893) 37 Sol. Jo. 233.

(d) *Re Moss* (1866) L. R. 2 Eq. 345.

(e) *Yonge v. Toynbee* [1910] 1 K. B. 215.

(f) *Fray v. Voules* (1859) 28 L. J. Q. B. 232; *Chown v. Par-*

*rott* (1863) 32 L. J. C. P. 197; *Pristwick v. Poley* (1865) 34 L. J. C. P. 189; *Carruthers v. Newen* [1903] 1 Ch. 812. (Ordinarily, a solicitor should always refer the question to his client for instructions. As to a solicitor compromising an action when the client, although apparently assenting, had, in fact, misunderstood the terms of settlement, see *Little v. Spreadbury* [1910] 2 K. B. 658.)

his client's claim (*a*), without the express consent of his client. The authority of the solicitor used in general to determine with the signing of final judgment in the action (*b*); but now it continues until the conclusion of the whole cause or matter (*c*), or until change under Order VII. r. 3. A solicitor who commences an action without authority to do so, or for a non-existent client, is personally liable for all the costs thereof (*d*).

In the exercise of his employment, the solicitor must use judgment; and although privileged from disclosing, and, indeed, bound not to disclose, the communications and documents of his client, he is not justified in conspiring or combining with him to effect a fraud or a judicial wrong (*e*). But this matter of privileged communications will be more properly considered hereafter, in connection with the proceedings in an action.

A solicitor is not incapable of purchasing any property, whether real or personal (not being the subject-matter of an action in which the client is concerned) from a client; but such a transaction is out of the common, and is viewed with jealousy. The onus of showing that the purchase price was not inadequate, that no advantage was taken by the solicitor, and that no concealment of any kind took place, is thrown upon the solicitor. The whole of the circumstances will be the subject of consideration, if the transaction is ever brought before the court. For his own protection, therefore, the solicitor should see that the client has the benefit of separate and independent advice (*f*).

(*a*) *Macaulay v. Polley* [1897] 2 Q. B. 122.

(*b*) *Tipping v. Johnson* (1801) 2 Bos. & P. 357. And see *Salton v. New Beeston Cycle Co.* [1900] 1 Ch. 43.

(*c*) *De la Pole v. Dick* (1885) 29 Ch. D. 351; *De Mora v. Concha* [1887] W. N. 194.

(*d*) *Schjott v. Schjott* (1881) 19

Ch. D. 94; *Simmons v. Liberal Opinion, Ltd.* (1911) 27 T. L. R. 278.

(*e*) *R. v. Cox* (1884) 14 Q. B. D. 153; *Williams v. Quebrada Rail. Co.* [1895] 2 Ch. 751; *R. v. Bullivant* [1901] A. C. 196.

(*f*) *Pisani v. A.-G. for Gibraltar* (1874) L. R. 5 P. C. 516. (See also *Luddy's Trustee v. Peard*

Mortgages by a client without independent advice to a solicitor are also not invalid (a); but full explanation, both as to documents to be signed by the client and the transaction generally, should be given to the client. The onus of showing that this was done is thrown upon the solicitor (b); and no omission of a usual provision will be permitted unless the mortgagor expressly agrees (c).

There is no objection to a solicitor accepting the offices of executor or trustee of a client's will. To enable a solicitor, however, to charge and be paid for either professional or non-professional work (which an executor or trustee not being a solicitor would do without payment), it is necessary that a clause to that effect, known as a *charging clause*, should appear in the will. Such a clause should not be inserted without the client's express authority (d).

A solicitor cannot validly accept a gift *inter vivos* from a client (e); but he may accept a legacy (f). A solicitor acting for both a vendor and a purchaser may receive a commission from the vendor for the introduction of the purchaser; but only if the latter has full knowledge of the facts (g).

A solicitor represents himself as possessing the requisite ability and skill to undertake any legal work that may be entrusted to him; and, therefore, if by negligence or ignorance he does not perform such work properly, the client has a right of action against him (h). A solicitor

(1886) 33 Ch. D. 500; *Coaks v. Boswell* (1886) L. R. 11 App. Ca. 232.

(a) *Cockburn v. Edwards* (1881) 18 Ch. D. 449; *Macleod v. Jones* (1883) 24 Ch. D. 289; *Wright v. Carter* [1903] 1 Ch. 27. The solicitor is entitled to charge and be paid the usual legal charges in respect of such mortgages and of transfers and reconveyances thereof (Mortgages' Legal Costs Act, 1895 (58 & 59 Vict. c. 25). See *post*, p. 305).

(b) *Prees v. Coke* (1870) L. R. 6 Ch. D. 645.

(c) *Cockburn v. Edwards* (1881) 18 Ch. D. 449.

(d) *Re Chalinder and Herington* [1907] 1 Ch. 58.

(e) *Liles v. Terry* [1895] 2 Q. B. 679.

(f) *Parfitt v. Lawless* (1872) 41 L. J. P. 68.

(g) *Haslam v. Hier-Evans* [1902] 1 Ch. 765.

(h) *Swinfen v. Swinfen* (1857) 26 L. J. C. P. 97; *Swinfen v. Lord Chelmsford* (1860) 29 L. J. Ex. 382; *Whiteman v. Hawkins* (1878) 4 C. P. D. 13.



is also liable for the want of care, knowledge, or honesty of his partner (a), clerk (b), or London agent (c). The Statute of Limitations is, however, a good defence to any action of negligence (d); except where there is fraud (e).

*C. Solicitors' bills of costs, and their remuneration generally.*—Solicitors as such are entitled to be paid for their professional work; and they may either enter into a special agreement with their client as regards their remuneration, or they may dispense with such agreement.

First, where they enter into an agreement. Such an agreement is of a special character, and is, broadly speaking, governed by the Attorneys and Solicitors Act, 1870, and the Solicitors' Remuneration Act, 1881. Before these Acts, a solicitor might (as he still may) make an agreement as to his past costs, but not as to costs to be incurred (e); but he may now also make an agreement as to his future costs. Such agreement, however, must be in writing (f), unless it be merely a promise by the solicitor not to make any charge at all (g); and it must be signed by the client at all events (h), though not necessarily by the solicitor (i). A solicitor may agree, of course, to charge nothing for his labour (k), or to charge costs out

(a) *Blyth v. Fludgate* [1891] 1 Ch. 337. (The wrongful act of a solicitor-trustee, in his capacity of trustee, does not, however, make his partners liable (*Palmer v. S.* [1907] 51 Sol. Jo. 653).)

(b) *Lloyd v. Grace Smith & Co.* [1912] A. C. 716.

(c) *Re Ward* (1862) 31 Beav. at p. 11.

(d) *Dooby v. Watson* (1888) 39 Ch. D. 178.

(e) *Mitchinson v. Spencer* (1902) 86 L. T. 618.

(f) *Re Russell* (1885) 30 Ch. D. 114.

(g) *Jennings v. Johnson* (1873) L. R. 8 C. P. 425.

(h) *Re Lewis* (1876) 1 Q. B. D. 724.

(i) *In re Thompson* [1894] 1 Q. B. 462. (And see *Bewley v. Atkinson* (1879) 13 Ch. D. 283.)

(k) *Ashford v. Price* (1823) 3 Stark. 185. (Such an agreement precludes the solicitor from recovering costs either from the client (*Turner v. Tennant* (1846) 10 Jur. 429 n.) or from the other side (*Gundry v. Sainsbury* [1910] 1 K. B. 645).)

of pocket only (*a*). And, seeing that, if the benefit of the Acts is to be obtained, strict regard must be had to their provisions, we will proceed to state these provisions with some particularity.

(1) By the Attorneys and Solicitors Act, 1870, it is provided, that an agreement (which must be in writing to bind the client (*b*), but not to bind the solicitor), may be validly made between a solicitor and his client, respecting the amount and manner of his payment for either past or future services; but such an agreement (so far as it relates to contentious business), must receive the sanction of a taxing officer of the court which has power to enforce the agreement, that is to say, the amount payable under the agreement is not recoverable until the agreement itself has been allowed by such taxing master (*c*). And no action is to be brought on the agreement, so far as it relates to the mode of remuneration (*d*); any question arising under it being determined by the court on motion or petition. Moreover, any provision in the agreement, whereby the solicitor shall be expressed to be rendered not liable for negligence, or to be relieved from any responsibility to which he would otherwise be subject, is wholly void (*e*); and the agreement, if in any way considered by the courts to be unfair or unreasonable, may be disallowed and set aside. Also, no validity is given by the statute to any purchase by a solicitor of his client's interest in the property involved in the action, or to an arrangement whereby he is to be paid only in the event of the success of the action; both of which transactions are against the policy of the law (*f*). There is, however, no impropriety in a solicitor conducting a speculative action if he honestly takes pains to inform

(*a*) *Jones v. Reade* (1836) 5 A. & E. 529.

(*b*) S. 4.

(*c*) Act of 1870, ss. 4, 11; *Re Attorneys and Solicitors Act*, 1870 (1875) 1 Ch. D. 573.

(*d*) But see *Rees v. Williams* (1875) L. R. 10 Exch. 200.

(*e*) *Ibid.* s. 7.

(*f*) *Re Attorneys and Solicitors Act*, 1870 (1875) 1 Ch. D. 573.

himself that there is a *bonâ fide* cause of action (a). An agreement under the Attorneys and Solicitors Act, 1870, is not to affect the interests of third parties; and the agreement is to be deemed to exclude all other claims, save in so far as it expressly excepts them (b).

(2) By the Solicitors' Remuneration Act, 1881, which limits the operation of the Attorneys and Solicitors Act, 1870, to contentious business, it is provided, as regards non-contentious business (that is to say, business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing), that an agreement may be made between a solicitor and his client, before or after or in the course of the business, for the remuneration of the solicitor, as regards both the amount and the manner thereof; the agreement being in writing (c), and signed by the person to be bound thereby, or by his agent in that behalf (d). The agreement is to express whether all or some only (and what) disbursements in respect of searches, travelling expenses, stamps, plans, and the like, are to be included or not in the agreed remuneration. The agreement may be enforced or set aside by action, or it may be reviewed under an order for taxation (e).

Second, where no express agreement as to remuneration has been entered into between a solicitor and his client, either as to contentious business (under the Attorneys and Solicitors Act, 1870), or as to non-contentious business (under the Solicitors' Remuneration Act, 1881), the amount and manner of his remuneration is governed, as to non-contentious business, by custom,

- (a) *Rich v. Cook* (1900) 110 L. T. Jo. 94. A solicitor may, however, if the action is unsuccessful, be ordered to pay the costs of the other side. (As to a solicitor taking up a speculative action, see *Danzey v. Metropolitan Bank of England and Wales* [1912] 28 T. L. R. 327.)
- (b) Act of 1870, s. 6.
- (c) *Re Baylis* [1896] 2 Ch. 107.
- (d) Act of 1881, s. 8 (2); *In re Frape* [1893] 2 Ch. 284, s. 8 (2).
- (e) Act of 1881, s. 8 (4).

by the Solicitors Act, 1843, and the Solicitors' Remuneration Act, 1881, and the rules thereunder; and as to contentious business, by a vast number of statutes, and of orders and rules thereunder.

(1) By the Solicitors Act, 1843 (*a*), it is provided, as regards both contentious and non-contentious business, that no solicitor shall, as a general rule, commence an action or sue for his fees or charges in respect of any business done by him, although his claim is complete as soon as the business is done (*b*), until after the expiration of one calendar month (*c*) after a bill of his costs and charges, signed by him, shall have been delivered to the party to be charged. A solicitor who has delivered a bill may amend, and even deliver another bill, if no proceedings to tax the first bill have been commenced (*d*). In suitable cases, a solicitor should deliver with his bill of costs a cash account containing particulars of payments made during the progress of the matter, which, ordinarily, a solicitor does not make out of his own pocket, *e.g.* purchase moneys, estate duty (*e*), money deposited in Court as security for costs (*f*), stamp duties paid on the registration of a company (*g*). The party chargeable with the bill, may, on application, obtain an order referring the bill for taxation, and staying all proceedings for the recovery of the amount thereof in the meantime (*h*); or judgment for the amount to be ascertained on the taxation may, in a proper case, be given (*i*). By the same Act, the client, or party

(*a*) S. 37.

(*b*) *Coburn v. Colledge* [1897] 1 Q. B. 702.

(*c*) In special cases, the judge may order otherwise, *i.e.*, may dispense with this condition precedent (Act of 1875, s. 2).

(*d*) *Lumsden v. Shipcote Land Co.* [1906] 2 K. B. 433. (Previously a solicitor could not upon delivering a bill reserve a right to

alter or correct any item therein).

(*e*) *Re Kingdon and Wilson* [1902] 2 Ch. 242.

(*f*) *Re Buckwell and Berkeley* [1902] 2 Ch. 596.

(*g*) *Re Blair and Girling* [1906] 2 K. B. 131.

(*h*) *Re Nelson* (1885) 30 Ch. D. 1; *Re Thompson*, *ibid.* 441.

(*i*) *Lumley v. Brooks* (1889) 41 Ch. D. 323.

chargeable with the costs, may obtain an order directing the solicitor to deliver his bill of costs, when he has not done so; and the same order (or a further order) will direct the solicitor, on payment, to deliver up all deeds, papers, and other documents of the client in his possession touching the matters comprised in the bill of costs (*a*). And even after payment, a bill of costs may, on the ground of special circumstances, *e.g.*, of pressure (*b*) or manifest overcharge (*c*), be ordered to be taxed; provided the application is made within twelve months after payment (*d*). But if it is the intention of the client to object to certain items in the bill as statute-barred, a special order for taxation of the bill must be obtained (*e*).

(2) By the Solicitors' Remuneration Act, 1881, it was enacted, that the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the President for the time being of the Law Society, and the President of one of the provincial Law Societies, to be selected by the Lord Chancellor, or any three of them, the Lord Chancellor being one, might from time to time make any General Order for regulating the remuneration of solicitors in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business, not being business in any action (*f*), or transacted in any court, or in the chambers of any judge or master, and not being otherwise contentious business. And by the same

(*a*) Act of 1843, s. 37; *Brooks v. Bockett* (1847) 9 Q. B. 847; *Ex parte Cobeldick* (1883) 12 Q. B. D. 149; *In re Debenham and Walker* [1895] 2 Ch. 430.

(*b*) *Re Bennett* (1845) 8 Beav. 467; *In re Stephen* (1847) 2 Phill. 562; *In re Newman* (1867) L. R. 2 Ch. 707; and *In re Lacey & Son* (1883) 25 Ch. D. 301.

(*c*) *Re Thompson* (1845) 8 Beav. 237.

(*d*) Act of 1843, s. 41; *Ex*

*parte Pemberton* (1852) 2 De G. M. & G. 960; *In re Wellborne* [1901] 1 Ch. 312. (But see *In re Callis* (1901) 49 W. R. 316, and *In re Collyer-Bristow & Co.* [1901] 2 K. B. 839.)

(*e*) *In re Margetts* [1896] 2 Ch. 263.

(*f*) *Stanford v. Roberts* (1884) 26 Ch. D. 155; *In re Merchant Taylors' Company* (1885) 30 Ch. D. 28; *Humphreys v. Jones* (1885) 31 Ch. D. 30.

Act (a) it was provided, that any such General Order might, as regards the mode of remuneration, prescribe that it should be according to a scale of rates of commission or percentage, varying or not in different classes of business, or by a gross sum, or by a fixed sum for each document prepared or perused, without regard to length, or in any other mode, or partly in one mode, and partly in another or others. And as regards the amount of the remuneration, it was provided that the Order might regulate the same with reference to all or any of the following, among other, considerations: namely, the position of the party for whom the solicitor is concerned in any business, that is, whether as vendor or as purchaser, lessor or lessee, mortgagor or mortgagee, and the like; the place, district, and circumstances at or in which the business or part thereof is transacted; the amount of the capital money, or of the rent, to which the business relates; the skill, labour, and responsibility involved on the part of the solicitor; the number and importance of the documents prepared or perused, without regard to length; and the average or ordinary remuneration obtained by solicitors in like business at the date of the passing of the Act. And the Act further provided (b), that any such General Order might authorise and regulate the taking by a solicitor from his client of security for future remuneration in accordance with any such Order, such remuneration to be ascertained by taxation or otherwise; and might also authorise and regulate the allowance of interest thereon.

A General Order for the regulation of all the above matters was accordingly made, and has been in operation since the 1st January, 1883; and the substance and effect of this Order may be roughly stated as follows. As regards non-contentious business, to which alone this Act and the General Order thereunder are applicable, two modes of remuneration are provided, either (i.) by the

percentage or commission appointed by Schedule I. to the General Order; or (ii.) by the old method of remuneration, as altered by Schedule II. to that Order. The solicitor may elect between the two methods; provided he communicates his election to his client before entering upon the business. Such election, however, must be in writing; and, if the solicitor does not so elect, then the first of the two methods becomes applicable (a).

Schedule I. is subdivided into two parts; Part I. being in respect of sales, purchases, and mortgages, and Part II. being in respect of leases, agreements for leases, and conveyances at a rent (not being mining leases, or building leases, or agreements for either). Schedule II. provides generally for whatever is not covered by Schedule I., that is to say, for settlements, mining leases or licences and agreements therefor, re-conveyances, transfers of mortgages, and further charges, and generally all other matters of conveyancing (b); as also for all matters remaining uncompleted which would, if completed, fall within one or other of the two Parts of Schedule I. (c). As regards matters falling within Schedule I., the solicitor's remuneration is to be according to the scale of charges thereby prescribed, being a percentage on the amount of the purchase or mortgage money, or on the rental; and, as regards matters falling within Part I. of that schedule, a negotiation fee also, calculated at a percentage on the purchase or mortgage money, is allowed, in addition to the conveyancing remuneration, even though the business may be transacted with the solicitor himself in his individual capacity (d). But no such negotiation fee is allowed as regards matters falling within Part II. of that schedule (e).

(a) *Re Field* (1885) 29 Ch. D. 26 Ch. D. 155.

608; *Re Allen* (1887) 34 Ch. D. (c) *Newbould v. Bailward*  
433; *Hester v. Hester*, *ibid.* 607; (1888) L. R. 14 App. Ca. 1.

*Re Metcalfe* (1887) 57 L. J. Ch. (d) *In re Norris* [1902] 1 Ch.  
82. 741.

(b) *Stanford v. Roberts* (1884) (e) *Re Field* (1885) 29 Ch. D.

With regard to the matters regulated by the old system, as altered by Schedule II., the remuneration is not ascertained by percentage, but in the old way, by folio, labour, and the like ; and it is a special provision of this Schedule, that, in special cases, the taxing master may, for special reasons, increase or diminish the prescribed allowances. There is also a somewhat similar provision to this, applicable to Schedule I. ; namely, that in respect of any business which is required to be, and which is, by *special exertion*, carried through in an exceptionally short space of time, the solicitor may be allowed, according to the circumstances, a proper additional remuneration for the special exertion.

For a more complete account of the provisions of this General Order, the reader must be referred to the Order itself, and to the scales prescribed thereby, and to the particular rules comprised in the several parts of Schedule I. and in Schedule II. (a). We will add, however, two further remarks, namely :—(1) that the remuneration prescribed by Schedule I. does not include stamps, counsel's fees, auctioneer's or valuer's charges, travelling or hotel expenses, fees paid to public officers on searches, or on registrations, or to stewards of manors, or the like, or any extra work occasioned by changes occurring in the course of the business, *e.g.*, by death, bankruptcy, or the like ; and (2) that a solicitor may accept from his client security for the amount to become due, and for interest on such amount, but so that interest is not to commence till the amount due is ascertained, either by agreement or taxation. A solicitor may also charge interest at four per cent. per annum on his disbursements and costs, whether by scale or otherwise,

608 ; *Re Emanuel and Simmonds* (1886) 33 Ch. D. 40 ; *Re Allen* (1887) 34 Ch. D. 433.

(a) The general effect of the Order is dealt with in *Parker v. Blenkhorn* and *Newbould v. Bail-*

*ward* (1888) L. R. 14 App. Ca. 1. Matters of detail are to be found in the *Digest of Decisions and Opinions* published by the Law Society (5th edn.), 1906.



from the expiration of one month from demand made upon the client. In cases where such disbursements and costs are payable by an infant, or out of a fund not presently available, such demand may be made on the parent or guardian, or the trustee or other person liable.

The Mortgagees' Legal Costs Act, 1895 (*a*), enabled a solicitor or his firm to charge and be paid for all business incidental to any mortgage, made to him either alone, or jointly with any other person, or incidental to any transfer or transmission thereof, such usual professional charges and remuneration, as he, or they, would have been entitled to receive, if the mortgage, or the transfer or transmission thereof, had been made to, or vested in, a person not a solicitor.

(3) As regards contentious business, where no special agreement as to the solicitor's remuneration has been entered into, the provisions and rules applicable are of too minute and detailed a character to admit of any condensed statement. We can only refer to Order LXV. of the Supreme Court Orders and Rules of 1883, and to the more or less casual references to the costs of litigation in general, and in certain particular kinds or classes of actions, which will be found in our treatment of Civil Injuries, in Book V. of this treatise.

D. *The remedies for and against solicitors, in respect of costs.*—It has already appeared incidentally, that either the solicitor (*b*) or the client may obtain an order for the taxation of his costs ; and such order is, in the ordinary case, obtained on an *ex parte* application. If

(a) 58 & 59 Vict. c. 25.

(b) But the solicitor who presents a petition for the taxation of his own costs is at this disadvantage, that, unless the client attends at the taxation, the solicitor has to pay the costs of taxation in any event (See Act of 1843, s. 37, and *In re Woollett*

(1844) 12 M. & W. 504. But see also *dictum* of BYRNE, J., in *Re Kingdon and Wilson* [1902] 2 Ch. 251). Whereas, if the petition be presented by the client, and less than one-sixth be taxed off the amount of the bill, the costs of taxation are payable by the latter.

the application therefor is made within a year from the delivery of the bill of costs, the order is made as a matter of course, or almost as a matter of course. If made in the Chancery Division, the order provides also for payment; but if made in the King's Bench Division, the order is merely for taxation. No order for taxation will be made of costs relating exclusively to business done by a solicitor otherwise than as a solicitor (*a*).

Where the order for taxation is not obtainable as of course, it must be obtained on a special application by summons, duly served by the applicant upon the other party; such special application being, in general, necessary after the lapse of the year, or after payment, or when the retainer is disputed, and, generally, when there is any special circumstances affecting more or less the right to payment. It is always desirable for a solicitor actually to deliver a bill of costs; even when the client is willing to pay, and has actually paid, an agreed sum. For where there is merely a verbal statement as to the amount of the costs, a solicitor may be ordered to deliver a bill in respect thereof, for purposes of taxation, even more than twelve months after payment (*b*). If, however, a client has waived delivery of a bill, and there has been a settlement of accounts, the question of charges will not ordinarily be reopened (*c*); although it has recently been decided that, even where the solicitor and client agreed the costs, and the client gave a bill of exchange for the amount due, he could yet require a detailed bill to be delivered (*d*).

Speaking generally, there are four ways in which a solicitor can compel payment of the amount due to him for costs. (i.) He may enforce the submission to pay, contained, as we have seen, in the order for taxation, when such order has been made in the Chancery

(*a*) *In re Baker, Lees, & Co.*  
[1903] 1 K. B. 189.

(*b*) *Re West, King and Adams*  
[1892] 2 Q. B. 102.

(*c*) *Re Chapman* (1903) 20  
T. L. R. 3.

(*d*) *Ray v. Newton* [1913] 1  
K. B. 249.

Division. (ii.) He may obtain a 'charging order,' under the Solicitors Act, 1860 (*a*), upon any property that may have been recovered or preserved as the result of any proceeding in any court, in which proceeding he has been employed (*b*); but this remedy is limited to the costs incurred in respect of the particular property recovered or preserved (*c*). (iii.) He may enforce his general lien against all deeds and other documents belonging to his client which may be in his, the solicitor's, possession (*d*). (iv.) He may bring an action against his client to recover the amount due on the bill (*e*); but this action must ordinarily be brought within the period of five years and eleven months after delivery of the bill (*f*).

In matters affecting the solicitor as such, *e.g.*, for any misconduct, or breach or failure of his duty as a solicitor (*g*), the remedy of the client is, in general, by application to the Court, which exercises over solicitors a very wide summary jurisdiction, on applications intituled in the matter of the solicitor, and sometimes on applications not so intituled (*h*), but of which notice has been duly given to the solicitor (*i*). In all other cases, however, an action must be brought against him in the ordinary way, as already mentioned on a previous page (*k*).

(*a*) S. 28.

(*b*) See *Ex parte Twced* [1899] 2 Q. B. 167; *Goodfellow v. Gray*, *ibid.* 498; *In re Cook* [1899] 1 Q. B. 863.

(*c*) *Bozon v. Bolland* (1839) 4 My. & C. 354.

(*d*) *In re Taylor, Stileman, and Underwood* [1891] 1 Ch. 590. (A solicitor has, it may be stated, three kinds of lien to protect his right to recover costs; (1) a passive or retaining lien, (2) a common law lien on property recovered or preserved by his efforts, and (3) a statutory lien

enforceable by charging order.)

(*e*) *Lumley v. Brooks* (1889) 41 Ch. D. 323.

(*f*) *Coburn v. Colledge* [1897] 1 Q. B. 702.

(*g*) *Ex parte Edwards* (1881) 7 Q. B. D. 155. (But see *In re Carroll* [1902] 2 Ch. 175.)

(*h*) *Re Ward* (1862) 31 Beav. 1; *Re Dangar's Trusts* (1889) 41 Ch. D. 178; *Swyny v. Harland* [1894] 1 Q. B. 707. And see Ord. LII. r. 25.

(*i*) *Slater v. Slater* (1888) 58 L. T. 149.

(*k*) See *ante*, pp. 296-7.

E. *Discipline over solicitors*.—The Court also exercises a punitive, or disciplinary, jurisdiction over solicitors, and has power to strike a solicitor off the rolls upon certain statutory grounds, *e.g.*, because of some defect in his articles, service, admission, or enrolment (*a*); or when he has knowingly and wilfully acted as agent for an unqualified person, or allowed such person to use his name (*b*), or has been guilty of corrupt practices in connection with an election (*c*). The Court has also power to strike a solicitor off the rolls upon the ground of general misconduct, as, for example, when his conduct is of a fraudulent character (*d*); or when he is guilty of any contempt of court (*e*); or of a felony (*f*); or when he has been guilty of some professional misconduct, or of conduct showing him unfit to be a solicitor (*g*). Instead, however, of striking a solicitor off the rolls the punishment may be by commitment to prison or by attachment, or, by suspension from practice. The preliminary enquiry in cases where complaints are made against a solicitor for improper conduct in his dealings as such, is held by a committee of members of the Council of the Law Society nominated by the Master of the Rolls, and known as the Discipline Committee (*h*), who make a report as to such complaints. If such report is adverse, the matter is then set down for hearing by a Divisional Court, which either makes an order striking the solicitor off the rolls, suspending him from practice, dismissing the application, or otherwise as may seem proper. But the complainant is not bound by the finding of the Discipline Committee, and may apply direct to the Court to have the solicitor struck off the roll (*i*).

(*a*) Solicitors Act, 1843, s. 37.

(*b*) *Ibid.* s. 32.

(*c*) Corrupt Practices Act, 1883 (46 & 47 Vict. c. 51), s. 38 (7); Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 Vict. c. 70), s. 23.

(*d*) *Re Dudley* (1883) 12 Q. B. D. 44.

(*e*) *Re Freston* (1883) 11 Q. B. D. 545.

(*f*) *In re Cooper* (1898) 67 L. J. Q. B. 276.

(*g*) *Re Hardwick* (1883) 12 Q. B. D. 148. (There is an appeal to the Court of Appeal.)

(*h*) Act of 1888, ss. 12, 13.

(*i*) Solicitors Act, 1888, s. 12.

## BOOK V.

### OF CIVIL INJURIES.

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#### CHAPTER I.

#### OF THE DIFFERENT KINDS OF CIVIL INJURIES, AND THEIR REMEDIES.

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WE have now concluded such consideration as can be given to the first of the two great subjects into which the whole body of our law may be said to be divided, or with which it may be said to be concerned, viz. *rights*. We come therefore to the second of these subjects, viz. *wrongs*. And, as was said at an early stage of this work (*a*), wrongs may be sub-divided, according to the parties who may be supposed to sustain injury from their commission, into private wrongs or ‘civil injuries,’ and public wrongs or ‘crimes.’ In this book, therefore, we propose to deal with private wrongs or Civil Injuries; leaving to the concluding book of these Commentaries the subject of the Law of Crimes.

A private wrong or ‘civil injury,’ as was previously remarked (*b*), is a violation of a right vested in a private person, which violation is left to be redressed by that person, usually by means of legal proceedings, but occasionally (as we shall see) by the exercise of self-help. It is, however, perhaps even better to define a civil injury as a violation of a duty incumbent upon the wrong-doer, to the detriment of a private person in whom a corresponding right is vested; for this definition calls attention

(*a*) See *ante*, vol. i. p. 84.

(*b*) *Ibid.* p. 84.

to the important practical point, that, generally speaking, no action will lie against any person, unless that person has committed, or threatens to commit, a breach of duty.

According to the principles of the common law, the universally proper and suitable redress for a wrong of this character was an action for damages. We shall, accordingly, in this chapter, discuss the classification and nature of such civil injuries as were recognised and remedied in the common law courts. But, for many centuries, as has been previously explained (*a*), in another, and, for a long time, independent group of courts, known as 'courts of equity,' another list of civil injuries was gradually recognised and redressed; though in a manner very different from the remedies of the common law courts. Doubtless, the enforcement of both classes of remedies is now entrusted to the same tribunals; but, though the remedies themselves have been consolidated, or, at least, harmonised, the nature of each class still remains so distinct, that no account of civil injuries would be even approximately complete, unless some account of the origin and character of these equitable remedies were separately given. We shall, accordingly, follow an account of civil injuries recognised by the common law tribunals, with several chapters dealing with the nature of equitable remedies.

We shall then give a brief description of such few remedies as the law still allows the parties to exercise without the assistance of the courts, and then proceed to describe in detail the tribunals in which, and the procedure by means of which, civil injuries are normally remedied.

The older common law classification of civil remedies divided them into *actions real and personal*; but, when real actions fell into decay before the popularity of the action of ejectment in the sixteenth century (*b*), all

(*a*) See *ante*, vol. i. pp. 45-47.

(*b*) See *post*, pp. 333, 474.

common law actions became in effect personal, and the old classification became unmeaning, though real actions were not formally abolished till the nineteenth century (a). Accordingly, judges and text-book writers ceased to pay so much attention as before to the *forms of action* (b), and began to consider more carefully the *causes of action*. And, upon examination, it seemed to them that the great bulk of common law actions were founded either on breach of contract, or on tort, *i.e.* on some breach of a duty towards the plaintiff not arising out of contract. And so arose, about the end of the seventeenth century, the modern division of common law actions into *actions of contract* and *actions of tort*; and the distinction, though not until comparatively recent years, has now found its way into the statute book (c). Of course it does not quite cover all cases, *e.g.* actions for penalties, where no breach of duty towards the plaintiff can be alleged. But these exceptions are rare and unimportant; and we shall do wisely to adopt the familiar distinction, and make it the basis of this chapter. It will, accordingly, be convenient to consider first the remedies for breach of contract, and then the various rights the infringement of which gives the person injured a right to bring an action of tort.

If one of two parties to a contract commits a breach of it, the breach gives the other party an immediate right of action against him. He may, as we have seen (d), commit a breach by repudiating his obligations under the contract before the time for performance has arrived, or by putting it out of his power to perform them, or by failing, wholly or partially, to perform them. Thus, where the plaintiff was engaged to enter the defendant's

(a) Real Property Limitation Act, 1833, s. 36; Common Law Procedure Act, 1860, s. 26.

(b) There were, no doubt, important differences of form among personal actions, which were not finally abolished until

1852 (Common Law Procedure Act, s. 2). But these were less striking than the differences between real and personal actions.

(c) *E.g.*, County Courts Act, 1888, ss. 65, 66.

(d) See *ante*, vol. ii. p. 140.

service on a future date, and, before such date, was told that his services would not be required, it was held that he was entitled to sue at once for breach of contract, although the time for performing it had not arrived (*a*). In another case, the defendant promised to marry the plaintiff when his father died, but during his father's lifetime told her he would never marry her; and the court held that the plaintiff was entitled to sue him for damages at once, although the father might survive either of the parties (*b*). Again, where the plaintiff was engaged to contribute a series of articles to a periodical, which the defendants afterwards abandoned owing to the failure of the first numbers, it was held that the plaintiff was entitled to recover on a *quantum meruit* remuneration for the work he had done before the publication was abandoned, and also damages for the loss he had suffered in not being allowed to complete his part of the contract (*c*).

The usual remedy for breach of contract is an action to recover a debt, or other sum fixed by the contract or capable of being ascertained from its terms, or damages. In an action of the former kind, the sum recoverable is the amount of the debt, together with interest—in the cases where there is a right to recover interest either as part of the debt or as damages. Interest is, as we have seen (*d*), only payable by virtue of express or implied agreement, or statutory provision. But when it is so payable, it is calculated up to the date of the judgment; and from the time of signing judgment until it is satisfied, interest at the rate of 4*l.* per cent. is recoverable by statute on the amount of the judgment debt and costs (*e*).

Where the claim is for damages, the damages may

(*a*) *Hochster v. De la Tour*  
(1853) 2 E. & B. 678; 22 L. J.  
Q. B. 455.

(*b*) *Frost v. Knight* (1872) L. R.  
7 Ex. 114.

(*c*) *Planché v. Colburn* (1831)  
8 Bing. 14.

(*d*) See *ante*, vol. ii. pp. 190–  
191.

(*e*) Judgments Act, 1838, s. 17.



be *liquidated* or *unliquidated*; that is to say, may or may not be assessed in the contract. When the contract fixes a sum to be paid in the event of a breach of it, it, as we have seen (a), is a question of law depending on the construction of the whole contract whether the sum so fixed is to be treated as a *penalty* or as *damages* (b). If it is a penalty, the plaintiff is only entitled to recover the actual loss which he has suffered; as, for example, where the action is on a bond containing a promise to pay a penal sum on non-performance of the condition of the bond. If it is liquidated damages, the sum fixed by the parties is the amount recoverable as damages; neither more nor less. Thus, in building contracts there is often a stipulation that the contractor will complete the work within a fixed time, or pay a fixed sum *per diem* for delay (c); in charter-parties there is frequently a clause fixing the time within which the charterer must load or discharge the cargo, and fixing the rate of demurrage to be paid for the detention of the ship beyond such time (d); and in leases of public-houses a clause is sometimes inserted, providing for the payment to the landlord of a fixed sum in the event of the tenant's conviction for a breach of the licensing laws (e). In all these cases, the sum agreed on is recoverable as liquidated damages; because the loss accruing from the breach is absolutely uncertain, or, at least, cannot be accurately or reasonably calculated in money before the breach (f). But where the sum fixed is agreed to be paid in the event of the non-performance of something of certain or easily ascertainable value, less than the sum fixed, or in the event of the breach of any terms,

(a) See *ante*, vol. ii. pp. 209–211.

(b) For further explanation of this important rule, see *ante*, vol. ii. pp. 209–211.

(c) *Law v. Redditch Local Board* [1892] 1 Q. B. 127.

(d) *Gray v. Carr* (1871) L. R.

6 Q. B. 522; *Kish v. Cory* (1875) L. R. 10 Q. B. 553.

(e) *Ward v. Monaghan* (1895) 11 T. L. R. 529.

(f) *Strickland v. Williams* [1899] 1 Q. B. 382; *Webster v. Bosanquet* [1912] A. C. 394.

some of which are of certain and smaller value than the sum fixed, then the sum fixed is deemed to be a penalty ; even although the parties may have described it in the contract as liquidated damages (*a*).

When the action is brought to recover unliquidated damages, the damages claimed may be *general* or *special*, or both. As a rule, general damages only are recoverable ; that is to say, such damages as may reasonably be considered as arising directly and naturally in the usual course of things from the breach, or, to state the same principle in another way, such damages as the parties to the contract might reasonably, at the time of entering into it, have anticipated would be the probable result of a breach of it (*b*). Special damage, on the other hand, which arises from special or peculiar circumstances, and not in the ordinary course of events, is not taken into account ; unless the special circumstances were known to the party who has broken the contract, and it can be fairly inferred that he entered into the contract with reference to them. Thus, in an action for not delivering goods sold, the measure of the general damages recoverable by the buyer is, *primâ facie*, the difference between the contract price and the market value of similar goods at the time when they ought to have been delivered (*c*) ; because a reasonable person would contemplate that the likely result of the failure of the seller to deliver would be that the buyer would go into the market and purchase other similar goods. So, if the buyer wrongfully refuses to accept goods which he has agreed to purchase, the measure of damages is, *primâ facie*, the difference between the contract price and the market value at the time the goods ought to have been accepted ; for the seller is then

(*a*) *Astley v. Weldon* (1801) 2 B. & P. 346 ; *Kemble v. Farren* (1829) 6 Bing. 141 ; *Rayner v. Condor* [1895] 2 Q. B. 289.

(*b*) For damages dependent on contingencies, see *Sapwell v.*

*Bass* [1910] 2 K. B. 486 ; *Chaplin v. Hicks* [1911] 2 K. B. 786. (And see *ante*, vol. ii. pp. 145–146.)

(*c*) Sale of Goods Act, 1893, s. 51.

free to take the goods into the market and obtain the current price for them (a). If there is no market for the goods, the measure of damages is ascertained by estimating, in the best way possible, their value at the date of the breach.

But if the buyer has made a contract to resell the goods at a higher price than their market or current value, the loss of profit, or the compensation which he may have to pay to the sub-purchaser, is special damage, for which the buyer cannot recover from the seller who has wrongfully failed to supply the goods; unless the seller knew of the buyer's contract to resell them, and it can be fairly inferred that he contracted with the buyer on the terms that, if he broke his contract, he would be liable for the consequences of the buyer's failure to perform the sub-contract (b). Similarly, in an action against a carrier for delay in delivering goods, damages cannot be recovered to compensate the owner for the loss of a special contract for the sale of the goods at a higher price than the market value; unless the carrier had notice of the contract, and agreed, expressly or by reasonable implication, to be answerable for such special damage. Thus, in a case where the plaintiffs were under a contract to deliver on a specified day at a very high price, shoes for the use of the French army during the Franco-Prussian war, and handed them to the defendants for carriage, stating that they were under contract to deliver them on the day mentioned, but not stating the special nature of the contract, the court held that the defendants were not liable for the profits lost by the plaintiffs owing to the delay in the delivery of the shoes, and their consequent rejection by the purchasers (c). On the same principle, it was held that a carrier was not liable for loss sustained by the

(a) Sale of Goods Act, 1893, B. D. 85; *Ebbetts v. Conquest* s. 50. [1895] 2 Ch. 377.

(b) *Elbinger v. Armstrong* (c) *Horne v. Midland Ry. Co.*  
(1874) L. R. 9 Q. B. 473; (1873) L. R. 7 C. P. 583; 8 C. P.  
*Grébert v. Nugent* (1885) 15 Q. 131.

owners of a mill kept idle owing to the carrier's negligence in not delivering, by the time agreed on, a piece of machinery without which the mill could not be worked ; because the stoppage of the mill was not such a result as the carrier could reasonably have contemplated as the natural consequence of the delay (a). The principle is, that when goods are delivered to a carrier with a particular object, damages may be recovered for the natural consequences of the failure of that object, only if it was specially brought to the carrier's notice, or if circumstances were known to him from which the object ought reasonably to have been inferred (b). But we have not space to dwell further on this important point, which has also been discussed in an earlier portion of these Commentaries (c).

In cases where damages would not be an adequate compensation for breach of contract, the Court has power to compel the promisor to carry out his contract by granting a decree for *specific performance* or an *injunction*. These are equitable remedies, which, according to the general arrangement of our subject, would fall to be treated under the head of equity. But inasmuch as, since the Judicature Act, 1873, they may be granted by any judge of the High Court, it will be well to deal briefly with them here. Thus, a contract to convey land, or to allot shares in a company (d), or to do any other act, may be ordered to be specifically performed ; provided that damages would not be an adequate remedy, and that the court can superintend and enforce performance, and that the contract is fair and just in its terms, and is mutually enforceable. Under the Sale of Goods Act, 1893 (e), the court may, in any action for breach of

(a) *Hadley v. Baxendale* (1854) 19 Q. B. D. 30.  
9 Exch. 341.

(b) *Per Cockburn, C.J., in Simpson v. L. & N. W. Ry. Co.* (1876) 1 Q. B. D. 274. And see *Schulze v. G. E. Ry. Co.* (1887)

(c) See *ante*, vol. ii. p. 146.

(d) *Paine v. Hutchinson* (1868) L. R. 3 Ch. App. 388.

(e) 56 & 57 Vict. c. 71, s. 52.

contract to deliver *specific* goods, direct that the contract shall be performed specifically; without giving the defendant the option of retaining the goods on payment of damages. But the court will not grant specific performance of contracts for the sale of goods which can be easily replaced, or contracts to lend money (*a*), or contracts for the performance of personal services (*b*), which would involve a general superintendence which the court will not undertake, or ordinary building contracts (*c*), or gratuitous promises under seal (*d*), or contracts made with infants (*e*), or a contract induced by innocent misrepresentation, or which is harsh in its terms, or where the plaintiff has unreasonably delayed to bring his action (*f*).

An *injunction* may be granted to prevent the breach of covenants which run with the land (*g*), which are, of course, contracts, or for the breach of negative stipulations in a contract (*h*); such as a covenant by a lessee not to assign without the lessor's consent, a covenant by the vendor of a business and goodwill not to compete with the purchaser, or by a servant not to compete with his employer after the termination of the contract of service (*i*). A promise to do an act for a particular person only, such as to sell to or buy from the plaintiff and no one else, may be indirectly enforced by means of an injunction to

(*a*) *South African Territories v. Wallington* [1898] A. C. 309. D. 470; *Stephens v. Green* [1895] 2 Ch., at p. 162.

(*b*) *Johnson v. Shrewsbury Ry. Co.* (1853) 3 De G. M. & G. 914; (*e*) *Lumley v. Ravenscroft* [1895] 1 Q. B. 683.

(*f*) *Levy v. Stogdon* [1899] 1 Ch. 5.

(*g*) *Tulk v. Moxhay* (1848) 2 Phil. 774; *Richards v. Revitt* (1877) 7 Ch. D. 224; *John Brothers' Brewery Co. v. Holmes* [1900] 1 Ch. 188.

(*c*) *Mayor of Wolverhampton v. Emmons* [1901] 1 K. B., at p. 524. (But, as this case shows, certain classes of building contracts may be specifically enforced.)

(*h*) *Doherty v. Allman* (1878) 3 A. C., at p. 720.

(*i*) *Nordenfelt v. Maxim Co.* [1894] A. C. 535; *Robinson v. Heuer* [1898] 2 Ch. 451.

(*d*) *In re Lucan* (1890) 45 Ch.

prevent the promisor from acting for or dealing with any other person (a) ; but the court will not, except in special circumstances, enforce by this means contracts of personal service (b). In granting or refusing an injunction, the court exercises its discretion in accordance with equitable principles similar to those which are applied to claims for specific performance.

We now have to consider the application of the remedy by action to the non-performance or non-observance of duties, which are not voluntarily undertaken by contract, but are imposed by law on every member of the community, the breach of which constitutes a *tort*. A tort may be described as a breach of legal duty, not undertaken by contract, for the redress of which an action for damages may be brought at common law, by the party whose right has been infringed by it. As such duty is, in every case, co-extensive with the corresponding right, the nature of the duties the breach of which constitutes a tort can be conveniently explained by considering the various rights, the infringement of which amounts to a tort.

These rights may be absolute, or they may be qualified rights to be preserved from loss or damage by certain unauthorised acts or omissions of other persons. Thus, as has been previously explained (c), every man has an absolute right to *personal safety*, which may be infringed by *assault and battery* ; to *personal freedom*, which may be infringed by *false imprisonment* ; to *reputation*, which may be infringed by the publication of a *libel* ; to the *exclusive and undisturbed possession of his real or personal*

(a) *Donnell v. Bennett* (1883) 22 Ch. D. 835 ; *Clegg v. Hands* (1890) 44 Ch. D. 503 ; *Manchester Ship Canal Co. v. Manchester Racecourse Co.* [1901] 2 Ch. 37 ; *Metropolitan Electric Supply Co. v. Ginder*, *ibid.* 799.

(b) *Lumley v. Wagner* (1852) 1 De G. M. & G. 604 ; *Whitwood*

*Chemical Co. v. Hardman* [1891] 2 Ch. 416 ; *Grimston v. Cunningham* [1894] 1 Q. B. 125 ; *Davis v. Foreman* [1894] 3 Ch. 654 ; *Mutual Reserve Association v. New York Insurance Co.* (1897) 75 L. T. 528.

(c) See *ante*, Book I. (vol. i. pp. 84–93).

*property*, which may be infringed by any act amounting to a trespass. For the infringement of any such right he is entitled at common law to bring an action for damages (although he may not in fact have suffered any loss or inconvenience from the act complained of), and to recover at least nominal damages. In the actions above mentioned, damage is not part of the plaintiff's cause of action.

On the other hand, there are certain acts or omissions not authorised by law which are not actionable unless they cause actual damage; such as an act which is *negligent* or *fraudulent*. Thus, in an action founded on negligence, the plaintiff must prove that, by reason of the negligent act or omission complained of, he has suffered some actual loss or injury, as the direct or immediate consequence of it. He will fail in the action if he has not sustained any damage, or if the loss or injury suffered is not such as would, in the ordinary course of events, naturally or probably flow from the negligence complained of; in which case the damage is said to be 'too remote.' So, in an action of *deceit*, the plaintiff must show that he acted on the fraudulent misrepresentation of the defendant, and thereby suffered loss. In these actions, and also in actions for nuisance not amounting to a trespass, for malicious prosecution, for maintenance, for seduction, and in most actions of slander, damage is an essential part of the cause of action; and the right of action accrues from the date of the damage, and not from the date of the act which has caused it (a).

It should be observed, however, that it is not necessarily actionable to cause damage to another. The damage must be the result of some act or omission unauthorised by law; otherwise it is said to be *damnum sine injuria*, for which no action can be maintained. The following are instances of damage without any legal

(a) See *Darley Main Colliery Co. v. Mitchell* (1886) L. R. 11 App. Ca. 127.

cause of action. Where an owner of land does something on his land which he has a legal right to do, he is not answerable for damage which his neighbour may thereby suffer; even though the act was intended to injure his neighbour (*a*). Thus, he is not liable for digging a well on his own land, although the effect of it is to deprive his neighbour of percolating water which he would otherwise get; nor for erecting a building which shuts out his neighbour's view of the landscape (*b*); nor for allowing thistles to grow on his land, the seeds of which are carried by the wind on to his neighbour's land (*c*); nor for planting yew trees the branches of which do not project over his neighbour's land, but which poison his neighbour's cattle when trespassing on his land (*d*); nor is the occupier of an upper floor liable for the escape, without any negligence on his part, of water from a water-closet to the floor below (*e*).

Moreover, an act which is lawful does not necessarily become actionable because done from a bad motive (*f*); nor does an act which is unlawful cease to be actionable when done from a good motive (*g*). But there are cases in which an act causing damage may be lawful if done without malice, which would be actionable if done maliciously; that is to say, intentionally without just cause or excuse. Thus, it is not actionable to institute groundless criminal proceedings against a person, unless there be both malice and an absence of reasonable and probable cause, or to defame a person's reputation, falsely but without malice, on an occasion of qualified privilege. A trader has no right of action for loss caused by the

(*a*) *Mayor of Bradford v. Pickles* [1895] A. C. 587.

(*b*) *Aldred's Case* (1610) 9 Co. Rep. 58; *Chasemore v. Richards* (1859) 7 H. L. C. 349.

(*c*) *Giles v. Walker* (1890) 24 Q. B. D 656.

(*d*) *Ponting v. Noakes* [1894]

2 Q. B. 281.

(*e*) *Ross v. Fedden* (1872) L. R. 7 Q. B. 661. And see *Blake v. Woolf* [1898] 2 Q. B. 426.

(*f*) *Allen v. Flood* [1898] A. C. 1.

(*g*) *Kirk v. Gregory* (1876) 1 Ex. D. 55.



competition of rival traders (a); but he may recover damages in an action for slander of goods for loss caused by a false statement, made maliciously or without lawful occasion, disparaging the goods which he manufactures or sells (b). And where a person or company has absolute statutory powers to do what would be a nuisance if not authorised by the legislature, he or it is not responsible if damage results without negligence from what the legislature has sanctioned (c). But if the statutory powers conferred are merely permissive, and contain no express or implied exemption from ordinary liabilities, they must be exercised without infringing the common law rights of others (d). Therefore the statute (usually a private Act of Parliament) on which the defendants rely should be carefully studied in such cases.

Finally, it should be observed that the rights of which the infringement constitutes a tort may exist at common law or be conferred by statute; they may be public or private rights; and they may relate to the person, to reputation, or to property. Public rights are dealt with in another portion of this work (e). Private rights are seldom conferred directly by statute; but they are affected by various Acts of Parliament to which we shall refer incidentally in dealing with them. Generally speaking, therefore, private rights are conferred by the common law; and those the breach of which amounts to a tort are either to the person, the reputation, or the

(a) *Mogul Steamship Co. v. McGregor* [1892] A. C. 25; *Ajello v. Worsley* [1898] 1 Ch. 274.

(b) *Western Counties Manure Co. v. Lawes Manure Co.* (1874) L. R. 9 Ex. 218; *Ratcliffe v. Evans* [1892] 2 Q. B. 524; *White v. Mellin* [1895] A. C. 154.

(c) *Hammersmith Ry. Co. v. Brand* (1869) L. R. 4 H. L. 171; *London, Brighton Ry. Co. v. Truman* (1885) L. R. 11 App. Ca.

45; *National Telephone Co. v. Baker* [1893] 2 Ch. 186; *Lambert v. Lowestoft Corporation* [1901] 1 K. B. 590.

(d) *Metropolitan Asylum v. Hill* (1881) L. R. 6 App. Ca. 193; *Rapier v. London Tramways Co.* [1893] 2 Ch. 588; *Canadian Pacific Ry. Co. v. Parke* [1899] A. C., at p. 544.

(e) Book iv. (vols. ii. and iii.).

property of the complainant. With these rights, and the torts to which they give rise, we shall accordingly now proceed to deal.

## INJURIES TO PERSON, REPUTATION, OR PROPERTY.

### INJURIES TO THE PERSON.

Injuries to the person amount, usually, to assault, battery, or false imprisonment; but they may be the result of negligence which does not involve trespass, *e.g.*, where a guest at a hotel eats carelessly prepared food, and becomes ill in consequence.

(1) An *assault* is an offer or attempt to injure the body of another person; as where one, who is in a position to do harm to another, lifts his cane or his fist, threatening to strike him, or striking at him but missing him (*a*).

(2) A *battery* is the wilful striking of a person, however slightly, against his will; as by throwing water over him (*b*), or spitting on him, or striking him with any missile, or wounding him. The accidental wounding of a person does not constitute a battery if the wounder is engaged in doing a lawful act in a careful and proper manner. Thus, where a gamekeeper was accidentally shot by a member of a pheasant-shooting party, it was held that the injury was not actionable (*c*).

*Prima facie*, any act amounting to an assault or battery is actionable in the absence of legal justification; such as self-defence (*d*), or defence of property (*e*), or the moderate chastisement by a father of his child, by a

(*a*) *Read v. Coker* (1853) 13 C. B. 850. And see *Stephens v. Myers* (1830) 4 C. & P. 349.

(*b*) *Pursell v. Horn* (1838) 8 A. & E. 602.

(*c*) *Stanley v. Powell* [1891] 1 Q. B. 86.

(*d*) *Cockcroft v. Smith* (1705) 2

Salk. 642; *Oakes v. Wood* (1837) 3 M. & W. 150; *Wheeler v. Whiting* (1840) 9 C. & P. 262.

(*e*) *Blades v. Higgs* (1861) 10 C. B. N. S. 713, and 11 H. L. Ca. 621; *Butler v. Manchester Railway Co.* (1888) 21 Q. B. D. 207.

schoolmaster of his pupil (a), or by an employer of his apprentice (b). It is also to be observed, that if a person charged with assault before a court of summary jurisdiction is convicted, and suffers the punishment inflicted, or if the complaint is dismissed and a certificate of its dismissal is delivered to him, he is thereby released from civil proceedings in respect of the same assault (c), whether instituted by the prosecutor or by any other person, such as the husband of the person assaulted (d). But a master may be sued in respect of an assault committed by his servant in the course of his employment; although the servant has been convicted and punished for the offence (e).

(3) *False imprisonment* consists of totally (f) restraining, by force or show of authority (g), the liberty of another for any period, however short; and is *prima facie* actionable, unless the defendant can show that he acted in exercise of some sufficient legal authority. Thus a governor of a gaol may be liable to pay damages for detaining a prisoner without proper warrant (h), or after his acquittal (i); and railway companies have in several cases been held liable for detaining passengers on the suspicion, which has turned out to be mistaken, that they were travelling without having paid the proper fare (k). The legal authority justifying the arrest or imprisonment may be the order of a judge, or the warrant

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| (a) <i>Cleary v. Booth</i> [1893] 1 Q. B. 465.        | Bing. N. C. 212.  |
| (b) <i>Penn v. Ward</i> (1833) 2 C. M. & R. 338.      | (h) <i>Demer v. Cook</i> (1903) 88 L. T. 629.   |
| (c) Offences against the Person Act, 1861, ss. 42-45. | (i) <i>Mee v. Cruickshank</i> (1903) 86 L. T. 708.  |
| (d) <i>Masper v. Brown</i> (1876) 1 C. P. D. 97.      | (k) <i>Goff v. Great Northern Ry. Co.</i> (1861) 3 E. & E. 672; <i>Edwards v. Midland Ry. Co.</i> (1880) 6 Q. B. D. 287; <i>Lowe v. Great Northern Ry. Co.</i> (1893) 62 L. J. Q. B. 524; <i>Lambert v. Great Eastern Railway</i> [1909] 2 K. B. 776. |
| (e) <i>Dyer v. Munday</i> [1895] 1 Q. B. 742.         |   |
| (f) <i>Bird v. Jones</i> (1845) 7 Q. B. 743.          |   |
| (g) <i>Grainger v. Hill</i> (1838) 4                  |   |

of a magistrate; but there are circumstances in which a constable, and even a private person, may lawfully arrest without a warrant. Thus, a constable may arrest any person without a warrant if he has reasonable grounds for believing that a *felony* has been committed by the person arrested (*a*); and a private individual may do so, if a felony has been in fact committed, and he has reasonable grounds for believing that such felony was committed by the person arrested (*b*).

### INJURIES TO THE REPUTATION.

A person's reputation is what other people think of him; and not what he thinks of himself. The law protects reputation; but gives no civil redress for wounding a man's self-esteem. Thus it is not actionable (*c*) to speak or write in terms of abuse or disparagement, however gross and malicious, to the person only whose character is being attacked; because the attack cannot affect the opinion which other people, to whom it is not communicated, hold of the person attacked. To constitute an injury to reputation, it is therefore essential that the charge made should be communicated, or, to use the proper technical expression, *published*, to at least one person other than the person whose character is attacked.

It is a tort to publish to a third person anything which is *defamatory* and *untrue* of another. Any statement is defamatory of a person which exposes him to the hatred, ridicule, or contempt of others, or which tends to injure him in his office, profession, or trade. A statement may be defamatory in its natural and ordinary meaning, or, though innocent in such meaning, may, owing to circumstances known to the persons by and to whom it was

(*a*) *Hogg v. Ward* (1858) 27 L. J. Ex. 443; *Griffin v. Colman* (1859) 4 H. & N. 265; *Marsh v. Loader* (1863) 14 C. B. N. S. 535.

(*b*) *Beckwith v. Philby* (1827) 6 B. & C. 635; *Walters v. Smith* (1913) 30 T. L. R. 158. (As to arrests by private persons, see *post*, vol. iv., pp. 288–290.)

(*c*) It may, of course, be the offence of criminal libel (see vol. iv. pp. 84–87).

made, be understood, in a secondary sense which is defamatory. Where the complaint is, that words innocent in their ordinary meaning were intended to convey, and did convey, a defamatory imputation, the imputation complained of is technically called the *innuendo*. In such cases, the plaintiff is required to set out in his statement of claim the *innuendo* of which he complains; and at the trial it is for the judge to decide whether the words used by the defendant are reasonably capable of bearing the *innuendo* alleged, while, if they are, it is for the jury to say whether they did in the circumstances in fact convey the meaning complained of (a).

A defamatory statement, though cruel or malicious, is not actionable if true in substance and in fact. It may afford the person aggrieved a good ground for instituting criminal proceedings against the publisher of the libel; because a person indicted for the publication of a criminal libel, who relies by way of defence on its truth, must show not only that it was true, but also that its publication was for the public benefit. But the law gives no civil redress to a person aggrieved by the publication of a defamatory statement which is true. He cannot seek to recover damages for injury to a good reputation which he does not, or ought not to, enjoy (b). The law, however, presumes in favour of the person defamed that anything defamatory of him is untrue; unless and until the contrary is pleaded in the defence, and strictly proved by the defendant at the trial. The defence that the statement complained of is true in substance and in fact, is technically called a plea of *justification*.

When the defamatory matter is communicated or published in writing, or by picture, caricature, or effigy (c), or other permanent mode of conveying imputations, it is

(a) *Capital and Counties Bank v. Henty* (1882) L. R. 7 App. Ca. 741.

(b) *McPherson v. Daniels*

(1829) 10 B. & C., at p. 272.

(c) *Monson v. Tussauds, Ltd.* [1894] 1 Q. B. 671.

called a *libel*. If the defamatory matter is communicated or published by spoken words, or by gesture, or other transient mode of conveying imputations, the publication is called a *slander*. The main differences between an action for libel and an action for slander are the following.

First, the difference mentioned above, that an action for libel lies for the publication of defamatory matter in writing, or in any other permanent mode, and an action for slander for the publication of defamatory matter by spoken words.

Second, that a libel is actionable although the plaintiff may not have suffered any loss or damage, while a slander is not (except in the cases specified below) actionable without proof of actual damage; and therefore the plaintiff in an action of slander must generally prove that he has suffered some definite temporal loss as the direct result of the publication by the defendant of the words complained of. The following slanders, however, are actionable *per se*; that is, without proof of actual damage: (1) where the words charge the plaintiff with having committed a criminal offence for which he would be liable to imprisonment (*a*); (2) where they impute unchastity or adultery to a woman or girl (*b*); (3) where the words are spoken of the plaintiff in relation to an office of profit which he holds, or a profession or trade which he carries on, and tend to prejudice him in such occupation by imputing unfitness to discharge his duties or carry on his business, or any misconduct therein; (4) where the words relate to an office, which is not an office of profit, and impute such misconduct as would be a ground for the plaintiff's removal from that office (*c*); (5) where the plaintiff is a trader, words

(*a*) *Marks v. Samuel* [1904] 2 K. B. 287.

(*b*) Slander of Women Act, 1891.

(*c*) *Alexander v. Jenkins* [1892] 1 Q. B. 797; *Booth v. Arnold* [1895] 1 Q. B. 571; *Dauncey v. Holloway* [1901] 2 K. B. 441.

imputing insolvency to him (*a*); (6) where they impute that the plaintiff is suffering from a contagious disease (*b*).

Third, an action for libel must be brought within six years from the date of publication (*c*); whereas an action for slander which is actionable by reason only of actual damage, may be brought within six years from the time the damage was sustained (*d*), while for a slander actionable *per se*, the action must be brought within two years from the time of publication (*e*).

Fourthly, the publication of a libel may be punishable as a misdemeanour by fine or imprisonment, or criminal proceedings by way of indictment or information (*f*); but slander, as such, is never a crime, although spoken words, if blasphemous, obscene, or seditious, are within the criminal law.

In an action for libel or slander, the plaintiff must plead and prove the publication of it by the defendant to some person other than the plaintiff himself (*g*), or the defendant's wife or husband; for husband and wife are, for this purpose, deemed in law to be one person. But publication to the plaintiff's wife, and, possibly, to the plaintiff's husband, is sufficient publication for the purposes of an action (*h*). The following are examples of the publication of a libel: (1) where the writer of a letter containing a libel gives it to his clerk to make a copy of it (*i*); (2) where the libel is contained in a telegram (*k*) which the post office officials must necessarily read, or in a post card which they

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| ( <i>a</i> ) <i>Brown v. Smith</i> (1853) 13 C. B. 596.              | Hob. 62; <i>Pullman v. Hill</i> [1891] 1 Q. B., at p. 527.   |
| ( <i>b</i> ) <i>Bloodworth v. Gray</i> (1844) 7 M. & G. 334.         | ( <i>h</i> ) <i>Wennhak v. Morgan</i> (1888) 20 Q. B. D., at p. 637; <i>Wenman v. Ash</i> (1853) 13 C. B. 836; <i>Jones v. Williams</i> (1885) 1 T. L. R. 572. |
| ( <i>c</i> ) <i>Duke of Brunswick v. Harmer</i> (1849) 14 Q. B. 185. | ( <i>i</i> ) <i>Pullman v. Hill</i> , <i>ubi sup.</i>  |
| ( <i>d</i> ) 21 Jac. 1, c. 16.                                       | ( <i>k</i> ) <i>Williamson v. Freer</i> (1874) L. R. 9 C. P. 393.  |
| ( <i>e</i> ) <i>Littleboy v. Wright</i> (1662) 1 Lev. 69; 1 Sid. 95. |  |
| ( <i>f</i> ) Libel Act, 1843, ss. 4, 5.                              |  |
| ( <i>g</i> ) <i>Barrow v. Lewellin</i> (1615)                        |  |

may read (a); (3) where it is contained in a newspaper or book, the delivery of the libellous manuscript to the printer, and the delivery of each copy on sale or otherwise, constitute a separate publication, unless the defendant can show that he did not know that the paper or book contained a libel, and that his ignorance of the fact was not due to negligence (b). Unless the occasion is privileged, the intention with which the words complained of were published is immaterial; except as affecting the amount of damages which the jury may give. It is no excuse for the publication of a libel, that the defendant honestly believed in its truth (c), or published it by mistake (d), or in jest, or even that the defendant was unaware of the plaintiff's existence and used his name in a purely imaginary manner. It is sufficient that the words complained of were such as to lead ordinary readers who knew the plaintiff to think that they referred to him (e). And the defendant is liable to pay damages; unless he pleads and proves, justification, privilege, or fair comment. To establish a defence of justification, the defendant must simply prove that the statement complained of is true. The other two defences require a little more explanation.

*Privilege.*—Occasions on which the publication of defamatory matter is privileged are of two kinds. First, occasions of *absolute* privilege, where, on grounds of public policy, no action will lie, however untrue or malicious the statement may be. Such occasions arise when statements are made in the course of Parliamentary debates or proceedings, or of judicial, naval, or military proceedings, or

(a) *Robinson v. Jones* (1879) 4 Ir. L. R. 391. And see *Sadgrove v. Hole* [1901] 2 K. B. 1.

(b) *Emmens v. Pottle* (1885) 16 Q. B. D. 354; *Vizetelly v. Mudie's Library* [1900] 2 Q. B. 170; *Weldon v. Times Book Co., Ltd.* (1911) 28 T. L. R. 143.

(c) *Hunsley v. Ward* (1859) 6

C. B. N. S. 514.

(d) *Blake v. Stevens* (1864) 11 L. T. 543; *Shepherd v. Whitaker* (1875) L. R. 10 C. P. 502; *Hebditch v. McIlwaine* [1894] 2 Q. B. 54.

(e) *Hulton & Co. v. Jones* [1910] A. C. 20.



in reports published by the order of either House of Parliament (a). Second, occasions of *qualified* privilege, where, if the statement was made in such a way as not to exceed what was reasonably necessary for the occasion, no action will lie; unless the plaintiff can prove that the defendant acted maliciously, that is, in bad faith or from any improper or indirect motive, such as spite (b). The following statements are made on occasions of qualified privilege: (1) statements made in discharge of a legal, moral, or social duty, *e.g.*, communications made as to the character of a servant (c); (2) statements made in self-defence (d); (3) statements made with the object of protecting an interest common to the persons by and to whom it is made (e); (4) statements made to a public servant or official with the object of redressing a public grievance, or punishing or preventing a crime (f).

The following *newspaper* reports are also privileged: (1) the report of judicial proceedings, if fair and accurate, and not indecent, nor prohibited by order of the court, and published contemporaneously with such proceedings (g); (2) the report of proceedings in Parliament, if fair and accurate, and not made maliciously (h); (3) the report of proceedings of a lawful public meeting, or of any meeting of a town council, board of guardians,

(a) Parliamentary Papers Act, 1840.

(b) *Royal Aquarium Society v. Parkinson* [1892] 1 Q. B. 431.

(c) *Stuart v. Bell* [1891] 2 Q. B. 341; *Edmondson v. Birch* [1907] 1 K. B. 371. (It seems that this protection does not apply to the statements made by an ordinary trade protection society, working for profit (*Macintosh v. Dun* [1908] A. C. 391; *Greenlands, Ltd. v. Wilms-hurst* [1913] 3 K. B. 507).)

(d) *Laughton v. Bishop of Sodor and Man* (1872) L. R. 4

P. C. 495.

(e) *Quartz Hill Mining Co. v. Beall* (1882) 20 Ch. D. 501; *Hunt v. G. N. Ry. Co.* [1891] 2 Q. B. 189, at p. 191; *White v. Batey* (1892) 8 T. L. R. 698; *Macintosh v. Dun* [1908] A. C. 391 (P. C.); *Greenlands, Ltd. v. Wilms-hurst*, *ubi sup.*

(f) *Harrison v. Bush* (1855) 5 E. & B. 344; *Amann v. Damm* (1860) 8 C. B. N. S. 597.

(g) Law of Libel Amendment Act, 1888, s. 3.

(h) *Wason v. Walter* (1868) L. R. 4 Q. B. 73.

or other local authority, or of a vestry, if it is a fair and accurate report of a matter of public interest, or its publication is for the public benefit, and the proprietor of the newspaper has not, after request, refused to insert in it a reasonable letter by way of contradiction or explanation of the report (a).

*Fair comment.*—A statement, though defamatory and untrue, is not actionable if it is a fair comment on a matter which is of public interest, or has been submitted to the judgment of the public; such as the public conduct of any person who takes part in public affairs, literature, art, music, the drama, or public entertainments. The statement must be comment; that is to say, criticism or the expression of opinion on facts which are substantially true (b). The comment must be fair; that is to say, it must be the honest expression of opinion not actuated by malice, and the opinion must be relevant to the matter criticised (c), and not go beyond the limits of what may fairly be called criticism. Criticism must not be used as a cloak for mere invective, or for personal imputations not arising out of the subject-matter of the criticism, or not based on fact. It is for the judge to decide whether the matter commented on is a matter of public interest, and whether the comment is reasonably capable of being found by the jury to go beyond the limit of fair criticism. If there is some evidence from which the jury can find that the comment is unfair, or actuated by malice, it is for the jury to find whether it is so in fact (d). If the defendant is proved to have allowed

(a) Law of Libel Amendment Act, 1888, s. 4; *Kelly v. O'Malley* (1889) 6 T. L. R. 62; *Ponsford v. Financial Times* (1900) 16 T. L. R. 248.

(b) *Merivale v. Carson* (1887) 20 Q. B. D. 275.

(c) *McQuire v. Western Morning News* [1903] 2 K. B. 100; *Joynt v. Cycle Trade Publishing*

*Co.* [1904] 2 K. B. 292; *Thomas v. Bradbury, Agnew & Co.* [1906] 2 K. B. 627.

(d) See *per* Lopes, L.J., in *South Hetton Coal Co. v. N. E. News Association* [1894] 1 Q. B. at p. 141; and, *per* Collins, M.R., in *McQuire v. Western Morning News*, and in *Thomas v. Bradbury, Agnew & Co.*, *ubi sup.*

his view to be distorted by malice, it is immaterial that another person might without malice have made an equally adverse criticism (*a*).

In an action for a libel contained in a newspaper or other periodical publication, there is a further defence which is not available in other libel actions, namely, an apology under the Libel Act, 1843, and payment into court by way of amends. In such an action, it is a good defence that the libel was inserted without actual malice and without gross negligence, and that, before the commencement of the action, or at the earliest opportunity afterwards, a full apology was inserted (*b*). When the plea of apology is filed, money must be paid into court by way of amends (*c*); and in this, as in any other action of libel, the payment of money into court operates as an admission of liability (*d*).

#### INJURIES AFFECTING LAND.

Under this head we shall explain shortly the law relating to trespass, dispossession, and nuisance.

1. *Trespass*.—A person commits a trespass by entering without lawful authority on land or premises in the possession of another. If he has leave and licence, conferred directly by law, to enter for a particular purpose, he commits a trespass by using the land or premises for any purpose beyond that authorised, and the abuse of his authority relates back to the original entry, and he is deemed to be a trespasser *ab initio*; as where a landlord lawfully enters on his tenant's land to distrain for rent in arrear, and subsequently commits an unlawful act which makes the distress illegal and void (*e*). But if the

(*a*) *Thomas v. Bradbury, Agnew & Co., ubi sup.*, at p. 638. (There has been a tendency of recent years to adopt a mixed defence of justification and fair comment. The effect of such a pleading is considered in Pollock, *Torts* (9th ed.), pp. 268–70.)

(*b*) 6 & 7 Vict. c. 96, s. 2.

(*c*) 8 & 9 Vict. c. 75, s. 2.

(*d*) Ord. XXII. r. 1; *Fleming v. Dollar* (1889) 23 Q. B. D. 388; *Oxley v. Wilks* [1898] 2 Q. B. 56.

(*e*) This result has been abolished in certain cases by statute.

leave and licence was granted by the plaintiff, then the defendant's wrongful act does not relate back to his original entry ; and he is not liable as a trespasser (a).

A man is answerable not only for his own trespass, but for that of his cattle also, if they stray on to another's land ; unless the occupier of the land was under a duty to keep the fences in proper repair, and the straying was partly due to their defective condition (b). For damage done by cattle or any other animal or thing straying or found doing damage on another's land, the law gives the occupier of the land a right to distrain the cattle or thing *damage feasant* ('doing damage'), till the owner makes compensation for the damage. But if the occupier distrains, he cannot, so long as he holds the distress, also maintain an action for damages (c).

In some cases an entry on another's land is justifiable ; as where it is done in exercise of a right of way, or to execute in a legal manner the process of the law (d), or to levy a distress for rent, or to retake goods which the occupier of the land has unlawfully taken (e), or to drive out cattle which have strayed owing to the non-repair of a fence which the occupier was bound to repair, or to escape imminent danger, or in exercise of a public right, such as the right to enter a public inn if there is accommodation (f). If the entry is without lawful justification, the occupier of the land or premises may bring an action for damages, although he has not suffered any actual loss ; and if the trespass is of a continuing nature, or is likely to be repeated unless prevented, he may obtain an injunction to restrain it.

2. *Dispossession* or *ouster* consists of wrongfully with-

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| (a) <i>Six Carpenters' Case</i> (1610)  | 2 E. & B. 748.                          |
| 8 Co. Rep. 146.                         | (e) <i>Patrick v. Colerick</i> (1838) 3 |
| (b) <i>Lee v. Riley</i> (1865) 34 L. J. | M. & W. 483.                            |
| C. P. 212.                              | (f) <i>Dansey v. Richardson</i>         |
| (c) <i>Lehain v. Philpott</i> (1875)    | (1854) 3 E. & B. 144 ; <i>Greyven-</i>  |
| L. R. 10 Ex. 242 ; <i>Boden v.</i>      | <i>stein v. Hattingh</i> [1911] A. C.   |
| <i>Roscoe</i> [1894] 1 Q. B. 608.       | 355 (P. C.) ; <i>Cope v. Sharpe</i>     |
| (d) <i>Keane v. Reynolds</i> (1853)     | [1912] 1 K. B. 496.                     |

holding or taking possession of land from the person lawfully entitled to it. As actual possession gives a good title to land against everybody except the rightful owner or other person claiming through him, the claimant to land can only recover it by making out a better title to it than the person who is in possession. But where the relationship of landlord and tenant exists between the claimant and the person in possession, the latter is *estopped*, or prevented in law, from denying the landlord's title; and therefore the landlord, in order to recover possession, need only prove that the tenancy has expired.

In early times, possession of land was recovered by means of 'real' actions, *i.e.* actions in which recovery of possession was directly claimed; but, owing to their highly technical and tedious procedure, the 'personal' action of trespass *de ejectione firmæ*, or action of *ejectment*, as it was afterwards called, came to be resorted to instead of the real actions; and, as we have said, in 1833 real actions were (with a few unimportant exceptions) abolished by the Real Property Limitation Act (a). Since the passing of the Judicature Act, 1873, the mode of proceeding in the High Court for the recovery of the possession of land, whether by a stranger or by a landlord against his tenant, has been by an ordinary action for the recovery of land, in which the plaintiff claims possession of the land. If he succeeds in the action, he can enforce the judgment by means of a writ of possession, by which the sheriff is directed to put him in possession without delay. Where the yearly value or rent of the land in question does not exceed 100*l.*, possession of land or any tenement can be recovered by action brought in a County Court (b); and, in order to give landlords the option of a cheaper and more speedy remedy against tenants holding over after the tenancy

(a) 3 & 4 Will. 4, c. 27, s. 36. ss. 59–61, amended by the  
(See *ante*, p. 310.) County Courts Act, 1903.

(b) County Courts Act, 1888,

has expired or been duly determined, it has been provided by the Small Tenements Recovery Act, 1838 (*a*), that a tenant at will, or a tenant for a term not exceeding seven years, where the rent does not exceed 20*l.* a year, who fails to deliver up possession after his interest has ended or been duly determined, may, after being served with written notice, be ejected by warrant obtained from a court of summary jurisdiction. But the warrant will be stayed if the tenant gives security to bring an action to try his right to continue in possession, and to pay the costs in the event of his failing in the action.

It may be convenient to take notice here of certain other statutory provisions made to assist landlords in their remedies by action. First, by the Common Law Procedure Act, 1852 (*b*), every tenant must, on pain of forfeiting three years' rent, give notice to his landlord of any writ in ejectment delivered to him or coming to his knowledge; in order that the landlord may take the necessary steps to defend his title. Second, by the same Act (*c*) it is provided that if half a year's rent of any premises is in arrear, and the landlord has a right to re-enter for non-payment, and there is no sufficient distress on the premises, the landlord may, without any formal demand of the rent, or re-entry, serve a writ in ejectment for the recovery of the premises; and the judgment in such action is final and conclusive, unless the rent, together with the costs, is paid within six months after execution. Thirdly, by the Landlord and Tenant Act, 1730 (*d*), if any tenant wilfully holds over after the determination of the term, and after notice in writing demanding possession, an action may be brought against him for double the yearly value of the premises during the time he wrongfully detains them; and under the Distress for Rent Act, 1737 (*e*), any tenant with power to determine

(*a*) 1 & 2 Vict. c. 74.

(*d*) 4 Geo. 2, c. 28, s. 1.

(*b*) 15 & 16 Vict. c. 76, s. 209.

(*e*) 11 Geo. 2, c. 19, s. 18.

(*c*) *Ibid.* s. 210.

his lease, who gives notice of his intention to quit, but does not deliver up possession at the time mentioned, is liable for double his former rent for such time as he thereafter continues in possession.

3. *Nuisance*.—A nuisance may be defined as “the wrong done to a man by unlawfully disturbing him in the enjoyment of his property, or, in some cases, in the exercise of a common right” (a); but it will be found, on examination, that all nuisances primarily affect the enjoyment of land.

A nuisance is either *public* or *private*. A public nuisance is an unlawful act or omission to discharge a legal duty which causes inconvenience or annoyance to the inhabitants of or travellers through a particular locality, or interferes with the exercise or enjoyment by them of a right common to all. A public nuisance is a misdemeanor at common law, punishable by indictment; or it may be a statutory offence punishable by imprisonment, penalty, or fine in a court of summary jurisdiction (b). A private individual cannot bring an action in respect of a public nuisance; unless it has caused him some special damage beyond that suffered by him in common with other members of the public affected by it. Thus, it is a public nuisance to obstruct a highway; and a person who shares with other members of the public the inconvenience of not being able to use the highway in the ordinary manner, cannot maintain an action in respect of the obstruction (c). But a private person has a right of action for damages if the obstruction causes him special damage, such as by cutting off the means of access to his premises (d), or by injuring him physically whilst lawfully using the highway. Again,

- (a) Pollock, *Torts* (9th ed.), p. 412. (1867) L. R. 2 Ex. 316.  
 (b) *E.g.* under the Public Health Acts. (See *ante*, bk. iv. ch. vi.) L. R. 9 C. P. 400; *Fritz v. Hobson* (1880) 14 Ch. D. 542. And see *Barber v. Penley* [1893] 2 Ch. 447.  
 (c) *Winterbottom v. Lord Derby*

it is a public nuisance to allow premises or fences adjoining a highway to fall into a ruinous condition, or to dig a dangerous pit near the highway (*a*), so as to expose persons lawfully using the highway to risk of physical injury (*b*) ; and an action will lie at the suit of any person who thereby meets with physical injury. A highway authority, whose duty it is to maintain the public roads under its jurisdiction in a proper and safe condition, may be indicted, but is not liable to be sued, merely for not repairing a dangerous highway ; it is liable, however, to an action for damage caused by the negligent manner in which it has performed its duty to repair (*c*). This rule is sometimes expressed by saying that a highway authority is not liable for mere *non-feasance*, but is liable for *mis-feasance*. Thus it is liable for physical injury to a person who, in the dark, falls over a heap of stones improperly left unlighted on the highway during the work of repairs (*d*).

A private nuisance is some unauthorised act which causes injury to land, or interferes with a person's rights over the land of others, or materially interferes with the ordinary physical enjoyment of land, by causing injury to health or sensible personal discomfort (*e*). Thus, fumes from works have been held to constitute an actionable nuisance because they killed the shrubs on land adjoining (*f*). But in considering what amount of

(*a*) See Highway Act, 1835, s. 7, and also the Quarry (Fencing) Act, 1887, and, as to spring-guns or man-traps, Offences against the Person Act, 1861, s. 7.

(*b*) *Barnes v. Ward* (1850) 9 C. B. 392 ; *Tarry v. Ashton* (1876) 1 Q. B. D. 314 ; *Fenna v. Clare* [1895] 1 Q. B. 199 ; *Harrold v. Watney* [1898] 2 Q. B. 320 ; *Barker v. Herbert* [1911] 2 K. B. 633.

(*c*) *Cowley v. Newmarket Local Board* [1892] A. C. 345.

(*d*) *Foreman v. Mayor of*

*Canterbury* (1871) L. R. 6 Q. B. 214.

(*e*) *E.g.* ringing of bells (*Soltau v. De Held* (1851) 21 L. J. Ch. 153) ; noisy entertainments (*Inchbald v. Barrington* (1869) L. R. 4 Ch. 388 ; *Lambton v. Mellish* [1894] 3 Ch. 163) ; noisy crowds (*Walker v. Brewster* (1867) L. R. 5 Eq. 25 ; *Barber v. Penley* [1893] 2 Ch. 447) ; noisy stables (*Ball v. Ray* (1873) L. R. 8 Ch. App. 467 ; *Broder v. Saillard* (1876) 2 Ch. D. 692).

(*f*) *Tipping v. St. Helens*



inconvenience or annoyance will amount to a nuisance; regard must be had to the character of the neighbourhood; though it would seem that this consideration is not entitled to much weight when the nuisance complained of amounts to damage to property or serious personal discomfort (a). The fact that the plaintiff came to the nuisance of which he complains is no defence (b); nor is the carrying on of a noisy or offensive trade the less actionable because it is a reasonable or necessary occupation to carry on somewhere, and the place selected is convenient for the purpose (c).

The principle on which private nuisances are actionable is an application of the wider principle expressed in the maxim: *sic utere tuo, ut alienum non lædas*, which means that you must so use your own property as not to interfere with the legal rights of others.

There are three remedies for a private nuisance, viz. abatement, action for damages, and an injunction. To *abate* a nuisance is to remove it; and the law allows the person aggrieved by a nuisance to remove it, provided he can do so without trespassing on the land of an innocent person (d), and provided also that he causes no more damage than is necessary for the purpose of its removal. Thus, a man may lop off branches of his neighbour's trees if they overhang his land (e), or remove a gate which obstructs his right of way (f). The more prudent remedy, however (g), in most cases, is by action to recover damages for the injury sustained, and, if the nuisance

*Smelting Co.* (1865) L. R. 1 Ch. App. 66.

(a) *St. Helens Smelting Co. v. Tipping*, *ubi sup.*, at p. 650; *Polsue and Alfieri, Ltd. v. Rushmer* [1907] A. C. 121.

(b) *St. Helens Smelting Co. v. Tipping* (1865) 11 H. L. C. 642.

(c) *Bamford v. Turnley* (1862) 31 L. J. Q. B. 286; *Carey v.*

*Ledbitter* (1862) 13 C. B. N. S. 470.

(d) *Roberts v. Rose* (1865) L. R. 1 Ex. 82. (See further as to abatement, *post*, pp. 443–444.)

(e) *Lemmon v. Webb* [1895] A. C. 1.

(f) *Lane v. Capsey* [1891] 3 Ch. 411.

(g) See *Earl of Lonsdale v. Nelson* (1823) 2 B. & C., at p. 311.

is continuing, or cannot be adequately compensated in damages, for an injunction to restrain the repetition of the acts causing it, or to compel the wrongdoer to remove it (a).

### INJURIES AFFECTING CHATTELS.

Under this head we shall explain shortly the law relating to trespass, conversion, detainue.

1. *Trespass*.—Of the offence of trespass we have already spoken, in dealing with injuries affecting land (trespass *quare clausum fregit*) ; and it is here sufficient to say that trespass in respect of chattels (trespass *de bonis asportatis*) is substantially of the same character. Thus it consists, technically, of an invasion of possession ; and the action can, accordingly, be brought only by the person in possession of the chattels when the trespass occurred (b). Likewise, in such an action, the defendant cannot rely upon the plaintiff's want of title, or, as it is said, set up a *jus tertii* (c) ; it is sufficient that the plaintiff was actually possessed of the goods. But trespass to goods differs materially from trespass to land in this : that, as a general rule, the measure of damages in trespass to goods is the value of the goods, at any rate if the plaintiff has been deprived of the possession of them ; whereas, in the case of trespass to land, the damages are only the amount of loss which the plaintiff has actually suffered.

2. The offence of *detinue* consists in the wrongful

(a) *Tipping v. St. Helens Smelting Co.* (1865) L. R. 1 Ch. 66 ; *A.-G. v. Colney Hatch Asylum* (1868) L. R. 4 Ch. 146 ; *Clowes v. Staffordshire Potteries Co.* (1872) L. R. 8 Ch. 125 ; *Ramuz v. Southend Local Board* (1893) 67 L. T. 169 ; *Martin v. Price* [1894] 1 Ch. 276 ; *Shelfer v. City of London Lighting Co.*

[1895] 1 Ch. 287 ; *Jackson v. Normanby Brick Co.* [1899] 1 Ch. 438 ; *Colls v. Home and Colonial Stores* [1904] A. C. 179.

(b) *Hall v. Pickard* (1812) 3 Campb. 187.

(c) *Chambers v. Donaldson* (1809) 11 East, 65 ; *Jones v. Chapman* (1849) 2 Exch. 803.

withholding of chattels belonging to the plaintiff which (it is assumed) came, in the first instance, rightly (or at least not unlawfully) into the hands of the defendant. In an action of detinue, the judgment is for the recovery of the chattel itself, or its value ; and for damages for its detention. Formerly the defendant had the option of returning the chattel or paying its value ; and, if he chose the latter course, the chattel became his property. But now the plaintiff has the option of recovering the chattel itself or its value (a). The action of detinue has had a curious history ; but, as special forms of action are now abolished, it would not be profitable to dwell upon it, inasmuch as it is now hardly possible to imagine a case of detinue which could not equally well be treated as the offence which we are next about to describe, viz. the tort of conversion.

3. *Conversion* consists of any unauthorised dealing with the goods or chattels of another which amounts to a denial of the owner's title to them, or is inconsistent with his right to the immediate possession of them. The innocent intention of the defendant in an action of conversion is immaterial. Thus, a person who in good faith obtains possession of goods belonging to another, from a person who is not able to give any title to them, and disposes of them for his own benefit or that of the apparent owner, is guilty of conversion (b), and liable to the true owner for the value of the goods. Refusal to deliver up the goods on the demand of the true owner, though not in itself conversion, may be, and usually is, the best proof of its commission (c). It is also conversion if the hirer of goods sells or destroys them, or deals with them in a way wholly inconsistent with the contract of

(a) Common Law Procedure Act, 1854, s. 68 ; Ord. XLVIII. r. 1.

(b) *Hollins v. Fowler* (1875) L. R. 7 H. L. 757 ; *Consolidated Co. v. Curtis* [1892] 1 Q. B. 495 ;

*Farquharson v. King* [1902] A. C. 325.

(c) *Spackman v. Foster* (1883) 11 Q. B. D. 99 ; *Miller v. Del* [1891] 1 Q. B. 468 ; *Clayton v. Le Roy* [1911] 2 K. B. 1031.

bailment (a) ; but not if he merely deals negligently with them (b).

The person entitled to maintain the action of trover (as it is called) is the person legally entitled to immediate possession, who is generally the true owner ; but, as against a mere wrongdoer, possession gives a sufficient title. Thus, a finder or a bailee of goods is entitled to maintain an action of trover against a wrongdoer, who dispossesses him of them or destroys them, and to recover their full market value (c).

The other remedies for wrongful conversion or detention of goods are *recaption*, or the retaking of them peaceably, or an action of *replevin*, to recover the goods themselves, if they have been illegally distrained.

Lastly, we have to speak of a 'miscellaneous group of injuries which may affect either the person or the reputation, or the property, of the person injured. Under this head we shall explain shortly the law relating to negligence, deceit, malicious prosecution, maintenance, and seduction.

1. *Negligence* consists in doing some act which an ordinarily prudent and reasonable man would not do, or omitting to take some precaution which he would take, in order to avoid causing damage to other persons or their property. Negligence is a tort where there is a legal duty towards the plaintiff to use reasonable care or skill, a breach of such duty, and damage directly caused by the breach, as the natural and probable result of it. Speaking generally, the law casts upon every person the duty of using reasonable care where the failure to use such care would be likely in the ordinary course of events to cause

(a) *Cooper v. Willomatt* (1845) C. B. 977.

1 C. B. 672 ; *Austin v. Manchester Ry. Co.* (1850) 10 C. B. 454 ; *Mulliner v. Florence* (1878) 3 Q. B. D. 484.

(b) *Heald v. Carey* (1852) 11

(c) *Armory v. Delamirie* (1722) 1 Str. 505 ; *South Staffordshire Waterworks v. Sharman* [1896] 2 Q. B. 44 ; *The Winkfield* [1902]

P. 42.

damage to the person or property of another. Thus, every person using a highway on land or water is under a duty to take reasonable care to avoid doing injury to other persons lawfully on the highway. Bailees, or persons in possession of the goods of another for any purpose, are under a duty, independently of contract, to take reasonable care of them (a); and so also are public carriers of goods and passengers. An occupier of premises owes to persons who come to them on lawful business, a duty to use reasonable care to see that the premises are in a safe condition, or to give reasonable warning of danger of which he knows, or ought with reasonable care to have known (b). A lesser duty is owed to mere licensees and visitors (c); and even trespassers may in certain cases have a remedy for injury (though unintentional) caused by the occupier, more especially where there was an allurement into the trespass (d). The duty of an occupier of premises towards young children may be greater than it is towards grown persons (e). A surgeon (f), or any other person who professes to possess the ordinary degree of skill necessary to his calling, owes a duty to his patient, or the person who employs him, to exercise such skill. An employer owes to his servants a duty to use reasonable care for

(a) *Meux v. G. E. Ry. Co.* [1895] 2 Q. B. 387.

(b) *Indermaur v. Dames* (1867) L. R. 1 C. P. 274, 2 C. P. 311; *White v. France* (1877) 2 C. P. D. 308; *Heaven v. Pender* (1883) 11 Q. B. D. 503; *Owners of Apollo v. Port Talbot Co.* [1891] A. C. 499.

(c) *Southcote v. Stanley* (1856) 25 L. J. Exch. 339; *Lowery v. Walker* [1911] A. C. 10; *Cooke v. Midland Great Western Railway of Ireland* [1909] A. C. 229. For a discussion of the effect of this case upon the law, see Hamilton, L.J., in *Latham v.*

*Johnson* [1913] 1 K. B., at p. 409.

(d) *Latham v. R. Johnson and Nephew, Ltd.* [1913] 1 K. B., at p. 405; *Lowery v. Walker*, *ubi sup.*

(e) *Cooke v. Midland Great Western Railway of Ireland*, *ubi sup.*; *Latham v. R. Johnson and Nephew, Ltd.*, *ubi sup.*; *Scholfield v. Mayor, etc., of Bolton* (1910) 26 T. L. R. 230; *Harrold v. Watney* [1898] 2 Q. B. 320; *Barker v. Herbert* [1911] 2 K. B. 633; *Jenkins v. G. W. R.* [1912] 1 K. B. 525.

(f) *Gladwell v. Steggall* (1839) 5 Bing. N. C. 733.

their safety, by providing reasonably safe appliances (a), or seeing that appliances supplied by others for the use of his servants are reasonably safe (b), and by not giving improper orders. A person who delivers to another a dangerous thing, such as a loaded gun (c), or a dangerous chemical (d), which is likely to cause injury unless special precautions are taken, is under a duty to use reasonable care to prevent it from doing injury. But a carriage repairer is not liable for injury done by the carriage to a stranger to the contract owing to negligence in effecting the repairs; because he was not under any legal duty to the stranger to execute the repairs properly (e). And, for the same reason, a surveyor is not liable to a stranger who has acted, to his loss, on the faith of a certificate honestly but carelessly granted by the surveyor to his employer (f). Where there is a duty to use reasonable care, the standard of care which the law requires is that which a person of ordinary skill, prudence, and foresight, would use in the particular circumstances (g). The degree of caution which a reasonable man exercises varies according to the probability of damage being done if precautions are not taken. Thus, a person driving along a crowded street must have more skill, and exercise greater care not to run people down, than a person driving along a deserted country road.

The damages recoverable in an action of negligence are such as will fairly compensate the plaintiff for the actual injury or loss he has sustained; provided it was the normal and natural consequence of the negligence

(a) *Williams v. Birmingham Battery Co.* [1899] 2 Q. B. 338.

(b) *Biddle v. Hart* [1907] 1 K. B. 649.

(c) *Dixon v. Bell* (1816) 5 M. & S. 198.

(d) *George v. Skivington* (1869) L. R. 5 Ex. 1; *Clarke v. Army and Navy Co-operative Society* [1903] 1 K. B. 155; *Dominion*

*Natural Gas Co. v. Collins* [1909] A. C. 640 (P. C.)

(e) *Earl v. Lubbock* [1905] 1 K. B. 253.

(f) *Le Lièvre v. Gould* [1893] 1 Q. B. 491.

(g) *Readhead v. M. R. Co.* (1869) L. R. 4 Q. B. 379; *Richardson v. G. E. R.* (1876) 1 C. P. D. 342.

complained of. The distinction between loss which is the normal result of the negligent act or omission, and loss which is 'too remote,' is of great practical importance, and rests on principles which are sometimes difficult to apply. The general principle is, that damages are recoverable to compensate the plaintiff for such loss or injury suffered as would in the ordinary course of events naturally follow as the direct result of the defendant's negligence. A person is bound to guard against such consequences of his conduct as he might reasonably have foreseen, but not against results which he could not reasonably be expected to have anticipated. Loss which is not the natural and probable result of the defendant's negligence, or is such that he could not reasonably have been expected to guard against it, is said to be 'too remote,' and therefore is not recoverable (a); even although it would not have happened but for the defendant's negligence. The negligence complained of must be the effective cause (b), and not merely one of several contributing causes, of the damage.

The plaintiff is not entitled to recover any damages if he was himself guilty of contributory negligence; that is to say, where, notwithstanding the defendant's negligence, he could, by taking reasonable care, have avoided the accident or damage (c). Thus, if the plaintiff was knocked down and injured by the defendant's van, whilst it was being driven on the wrong side of the road, but it is proved at the trial that, although the van was where it ought not to have been, the plaintiff could by taking ordinary care have kept out of its way, he will fail in the action, and probably have to pay the costs of it. Where

(a) *Blyth v. Birmingham Waterworks Co.* (1856) 11 Ex. 781; *Glover v. L. & S. W. Ry. Co.* (1867) L. R. 3 Q. B. 25; *Sharp v. Powell* (1872) L. R. 7 C. P. 253.

(b) *Engelhart v. Farrant* [1897]

1 Q. B. 240.

(c) *Davies v. Mann* (1842) 10 M. & W. 546; *Tuff v. Warman* (1858) 27 L. J. C. P. 322; *Radley v. L. & N. W. Ry. Co.* (1876) L. R. 1 App. Ca. 754.

the plaintiff is a child of tender years, the rule of contributory negligence receives a more indulgent application (a).

When an action for negligence is tried with a jury, it is for the judge to decide whether any evidence has been given from which negligence causing the damage could be reasonably inferred; and, if there is such evidence, it is for the jury to decide whether negligence ought in fact to be inferred (b).

2. *Deceit*.—An action of 'deceit' (or fraud) may be brought against a person who has made, orally or in writing, a false representation of fact with a knowledge of its falsehood, or recklessly without belief in its truth, with the intention that it should be acted upon by the plaintiff (c), and the plaintiff has acted upon it, thereby incurring loss (d). It is not deceit to make a false statement honestly believing it to be true; although the statement is made carelessly, and without reasonable grounds for the belief in its truth (e). But, under the Companies (Consolidation) Act, 1908 (f), repealing the Directors' Liability Act, 1890, every promoter or director of a company who issues a prospectus inviting persons to subscribe for shares or debentures, is liable to pay compensation to any person who subscribes for them on the faith of the prospectus, for loss sustained by any untrue statement therein; unless it is proved that such promoter or director had reasonable ground for believing, and did in fact believe, that the statement was true.

3. *Malicious Prosecution*.—An action for malicious prosecution may be brought by a person against whom

(a) *Lynch v. Nurdin* (1841) 1 Q. B. 29; *Williams v. Great Western Railway Co.* (1874) L. R. 9 Exch. 157; *Harrold v. Watney* [1898] 2 Q. B. 320.

(b) *Metropolitan Ry. Co. v. Jackson* (1877) L. R. 3 App. Ca. 193.

(c) *Langridge v. Levy* (1837)

2 M. & W. 519.

(d) *Smith v. Chadwick* (1884) 9 App. Ca. 187.

(e) *Derry v. Peek* (1889) L. R. 14 App. Ca. 337; *Angus v. Clifford* [1891] 2 Ch. 449; *Le Lièvre v. Gould* [1893] 1 Q. B. 491.

(f) S. 84.



the defendant has maliciously, and without reasonable or probable cause, instituted criminal or bankruptcy proceedings (a), which have terminated in the plaintiff's favour, but have yet caused him loss or expense. The burden of proving malice, and also the absence of reasonable and probable cause, lies on the plaintiff. 'Malice' here means, that the defendant was actuated by spite, or by some other motive than that of furthering the ends of justice (b). 'Reasonable and probable cause' means that the defendant took reasonable care to inform himself of the true facts before instituting the proceedings complained of, and honestly believed the information given to him, and that the information, if true, would have justified the proceedings (c). The action is usually tried with a jury, who determine whether the defendant acted maliciously or not, and find the facts on which the question of reasonable and probable cause depends. It is then for the judge to decide whether the facts so found amount to reasonable and probable cause (d).

4. *Maintenance*.—An action for maintenance may be brought against a person who has, without lawful justification, assisted another to bring an action against the plaintiff (e), or to defend an action brought by the plaintiff. Assistance is justifiable if the defendant had a common interest in the action with the party maintained (f), or if he acted honestly from charitable

(a) *Quartz Hill Mining Co. v. Eyre* (1883) 11 Q. B. D. 674; *Metropolitan Bank v. Pooley* (1885) L. R. 10 App. Ca. 210.

(b) *Brown v. Hawkes* [1891] 2 Q. B. 718; *Cornford v. Carlton Bank* [1899] 1 Q. B. 392, [1900] 1 Q. B. 22.

(c) *Lister v. Perryman* (1870) L. R. 4 H. L. 521; *Hicks v. Faulkner* (1881) 8 Q. B. D. 167.

(d) *Abrath v. N. E. Ry. Co.* (1886) L. R. 11 App. Ca. 247.

(e) *Alabaster v. Harness* [1895]

1 Q. B. 339; *Savill v. Langman* (1898) 79 L. T. 44.

(f) See *Bradlaugh v. Newdegate* (1883) 11 Q. B. D. 1, at p. 11; *Guy v. Churchill* (1888) 40 Ch. D. 481; *British Cash and Parcel Conveyors, Ltd. v. Lamson etc., Ltd.* [1908] 1 K. B. 1006; *Scott v. National Society for Prevention of Cruelty to Children and Parr* (1909) 25 T. L. R. 789; *Oram v. Hutt* [1913] 1 Ch. 259; 30 T. L. R. 55 (on appeal).

motives (a). All contracts having maintenance for their object are void ; and it (probably) makes no difference that the action ‘ maintained ’ was successful (b).

5. *Seduction*.—An action of seduction may be brought by the parent or employer of a female servant who has been seduced by the defendant ; provided the plaintiff has thereby been deprived of the benefit of some service (c). Where the servant is the plaintiff’s daughter, she is deemed to have been in her parent’s service, if she was under twenty-one years of age, unmarried, and not in the service of an employer (d), or, whatever her age, if she lived at home and performed any domestic service, however slight (e). Although, in point of form, the action is for compensation for loss of service, the jury are justified in taking the whole of the circumstances into consideration, including the characters of the different parties involved (f), and in awarding exemplary or punitive damages.

An action for enticing away any servant may be brought by a master against a person who, knowing of a binding contract of service, entices away the servant without lawful justification (g) ; and an action will lie for receiving or continuing to employ the servant of another, after notice of the servant’s unexpired engagement with the plaintiff (h). This was, in fact, the old common law form of the action. But, inasmuch as the remedy for inducing

(a) *Harris v. Brisco* (1886) 17 Q. B. D. 504.

(b) *Alabaster v. Harness*, *ubi sup.* ; *Oram v. Hutt*, *ubi sup.*

(c) See *Manley v. Field* (1859) 7 C. B. N. S. 96, and *Hedges v. Tagg* (1872) L. R. 7 Ex. 283 ; where the parent of the girl seduced failed in the action, because there was no loss of service.

(d) *Terry v. Hutchinson* (1868) L. R. 3 Q. B. 599 ; *Whitbourne v. Williams* [1901] 2 K. B. 722.

(e) *Bennett v. Allcott* (1787) 2 T. R. 166 ; *Rist v. Faux* (1863) 4 B. & S. 409.

(f) *Dodd v. Norris* (1814) 3 Camp. 518 ; *Verry v. Watkins* (1836) 7 C. & P. 308.

(g) *Lumley v. Gye* (1853) 2 E. & B. 216 ; *Bowen v. Hall* (1881) 6 Q. B. D. 333. And see *Quinn v. Leathem* [1901] A. C. 495.

(h) *Blake v. Lanyon* (1795) 6 T. R. 221 ; *De Francesco v. Barnum* (1890) 63 L. T. 514.

a breach of contract has lately received a much wider application, the action for 'seduction' is now usually regarded as confined to the type of case first described under this head; the remedy against a stranger who induces the breach of a contract of service in other ways being usually regarded as an action for breach of contractual relations generally (a).

(a) *Temperton v. Russell* [1893] 1 Q. B. 715; *Quinn v. Leatham* [1901] A. C. 495; *Read v. Society of Stonemasons* [1902] 2 K. B. 732; *South Wales Miners' Fed. v. Glamorgan Coal Co.* [1905] A. C. 239; *Denaby v. Yorkshire Miners* [1906] A. C. 384; *National Phonograph Co. v. Bell* [1908] 1 Ch. 335; *Conway v. Wade* [1909] A. C. 506; and see the Trade Disputes Act, 1906, s. 3.

## CHAPTER II.

## OF EQUITY IN ITS RELATION TO LAW.

HAVING, in the previous chapter, considered those civil injuries which were recognised and remedied by the common law courts, we have now to describe those which have been gradually brought into existence by the jurisdiction of the courts of equity.

It has been already stated, that equity has, from an early time, constituted a large and important portion of our juridical system—a portion which was distinct from the common law, and which, until the middle of last century, was administered in its own peculiar courts.

Various attempts were made, in the seventeenth and eighteenth centuries, to embody in a single phrase this distinction between the legal and the equitable jurisdiction; but none of these attempts can be said to have been quite successful.

1. Thus, in the first place it was said, that it was the business of equity to abate the rigour of the common law. This, no doubt, was a primary aim of equity; but still there were many cases where the rigour of the law produced a real injustice, and equity did not interfere. For example, in the case of a bond creditor, whose debtor devised away his real estates, and so defeated him of his debt, equity did not interpose; also, land descended or devised was not (until about a century ago) liable for the simple contract debt of the deceased, even though such debt might have been the very purchase money payable for the land. Again, by the common law, a father could not succeed to the real estate of his son; and lands

would descend to a remote relation of the whole blood, or even escheat to the lord, but would not (by descent) go to the half-blood, even to a brother. But in none of those cases would equity have interfered ; unless there was some circumstance added, which equity would regard as a ground for its interposition.

2. Again, it was said, that equity determined according to the spirit of the rule, and not according to the strictness of the letter ; but so also did the common law, both being equally bound, and equally professing, to interpret statutes according to the true intent of the legislature, and documents according to the true intent of the parties. All cases cannot be foreseen ; and some cases therefore there must always be which will fall within the meaning, though not within the words of the legislature, and *vice versa*. These are sometimes said to fall within, or to be out of, the ' equity ' of the Act of Parliament ; meaning by equity, as thus used, nothing but the sound interpretation of the law. But there is not a single rule of interpreting a statute that is not equally used both at law and in equity ; the construction must in both be the same, each endeavouring to fix and adopt the true sense of the enactment in question, and neither being able to enlarge, diminish, or alter that sense, in a single tittle (a).

3. It was often said that fraud, accident, and trust, were the proper and peculiar objects of equity ; and yet most kinds of fraud were equally cognisable at law, and many accidents were also relieved against at law—as loss of deeds, mistakes in receipts or accounts, wrong payments, deaths which made it impossible to perform conditions literally, and a multitude of other contingencies. Also, some frauds or accidents could not be relieved against,

(a) This is not altogether the case as regards interpretation of ordinary documents ; *e.g.*, deeds, wills, etc. There equity sometimes raises presumptions as to the intention of the maker of the

instruments which are not supported by, or are opposed to, the words used by him. See, for instance, presumptions against double portions, and presumptive trusts, *post*, pp. 398, 439.

even in equity ; as, for example, the accident of a devise ill executed. And, as regarded trusts, although true trusts were peculiarly appropriate to equity, yet there were trusts which always were cognisable at law—*e.g.*, deposits, and all manner of bailments (*a*).

4. Again, it was sometimes said, that equity was not bound by precedents, but acted upon the opinion of the judge, founded on the circumstances of every particular case (*b*) ; but in truth the equitable jurisdiction has been, for the last century and longer (*c*), bound down by precedents from which it does not depart.

These views of equity were fairly accurate in the infancy of our courts of equity, before they had fully settled the principles of equitable relief. But the systems of jurisprudence, both at law and in equity, have long been equally positive systems ; and the two systems are also now in strict accordance with each other.

It must, however, be admitted, that equity and law, as administered previously to the recent changes, were not, in the exercise of their concurrent jurisdiction, consistent in some things ; so that the abuse occasionally arose, that a different rule obtained, according as the remedy of the suitor was at law or in equity. It was for this reason that

(*a*) Deposits and bailments, in so far as they can be described as trusts, are not *quasi*-trusts, but actual trusts. But in any proper sense of the term, they are not trusts at all, but simply real contracts. The distinguishing mark of a contract is that it can be enforced only by a party to it ; while a trust can be enforced by a *cestui que trust* who was no party to it, or who even was not born at the time it was created. (See *post*, p. 390.)

(*b*) Selden (*Table Talk*, tit. *Equity*) says :—“ For law we have “ a measure—know what to trust “ to ; *equity* is according to the

“ conscience of him that is chan-  
“ cellor, . . . ’Tis . . . as if they  
“ should make the standard for  
“ the measure . . . a chancellor’s  
“ foot. What an uncertain  
“ measure would this be ! ”

(*c*) As a matter of fact, the last occasion on which a court of equity avowedly established a new rule of law, unsupported by precedent, was in 1848, when restrictive covenants, though not binding in law, were held to be binding in equity on purchasers with notice of them (*Tulk v. Moxhay* (1848) 2 Ph. 774).

the framers of the Judicature Acts seized the occasion of the union of the several courts, whose jurisdiction was thereby transferred to the High Court of Justice, to amend and declare the law to be administered in England, as to certain matters respecting which such discrepancy existed. But, in fact, these differences were not numerous, as may be seen by a reference to the statute in question; and, though the section dealing with the subject (a), concludes with a general provision that where there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail, yet the importance of this sweeping enactment is much less than might be imagined by a person unfamiliar with our legal system.

Such, then, being the parity of law and reason which governs both systems, wherein (it may be asked) does their essential difference consist? And to this, the answer is, that the difference principally consists, in the subjects over which they exercise jurisdiction; in the kind of relief they administer; and in the modes of proceeding they pursue respectively.

*Subjects of jurisdiction.*—Some general idea of the nature of equitable business may be gained from that provision of the Judicature Acts which specifically assigns to the Chancery Division of the High Court of Justice the following causes and matters:—1. the administration of the estates of deceased persons; 2. the dissolution of partnerships, and the taking of partnership or other accounts; 3. the redemption and foreclosure of mortgages; 4. the raising of portions, or other charges on land; 5. the sale and distribution of the proceeds of property subject to any lien or charge; 6. the execution of trusts, charitable or private; 7. the rectification, setting aside, or cancellation of deeds or other written instruments; 8. the specific performance of contracts between vendors and purchasers of real estate, including

contracts for leases ; 9. the partition or sale of real estate ; and 10. the wardship of infants and the care of infants' estates (a).

But the above subjects do not include the whole of the jurisdiction which was transferred to the High Court of Justice from the old Court of Chancery ; and therefore the Judicature Acts proceed further to assign to the Chancery Division of the High Court, all causes and matters arising under any Act of Parliament whereby *exclusive* jurisdiction in respect thereof had been given to the Court of Chancery, or to any judge or judges thereof. Consequently, the jurisdiction of the Chancery Division of the High Court of Justice naturally divides itself into two parts ; the first consisting of that which it derives from the transfer to it of the several specific matters above enumerated, all of which arose out of the gradual growth of the equitable jurisdiction, and the other consisting of the jurisdiction which it derives from the divers miscellaneous enactments, which, in divers causes and matters have conferred exclusive jurisdiction on the former Court of Chancery or the present Chancery Division (b). The

(a) Judicature Act, 1873, s. 34.

(b) See (among other statutes) *Burial Acts* (15 & 16 Vict. (1852) c. 85 ; 16 & 17 Vict. (1853) c. 134 ; 17 & 18 Vict. (1854) c. 87 ; 18 & 19 Vict. (1855) c. 128 ; 20 & 21 Vict. (1857) c. 81 ; 22 Vict. (1859) c. 1 ; 23 & 24 Vict. (1860) c. 64 ; 25 & 26 Vict. (1862) c. 100 ; 34 & 35 Vict. (1871) c. 33) ; *Cestui que Vie Act* (6 Anne (1707) c. 72) ; *Charitable Trusts Acts* (16 & 17 Vict. (1853) c. 137 ; 18 & 19 Vict. (1855) c. 124 ; 32 & 33 Vict. (1869) c. 110) ; *Mortmain and Charitable Uses Acts* (51 & 52 Vict. (1888) c. 42 ; 54 & 55 Vict. (1891) c. 73) ; *Charitable Trustees Incorporation Act*, 1872 (35 & 36 Vict. c. 24) ;

*Church Building Act*, 1845 (8 & 9 Vict. c. 70) ; *Companies Acts*, 1862 to 1900 (25 & 26 Vict. (1862) c. 89 ; 30 & 31 Vict. (1867) c. 131 ; 33 & 34 Vict. (1870) c. 104 ; 40 & 41 Vict. (1877) c. 26 ; 42 & 43 Vict. (1879) c. 76 ; 43 Vict. (1880) c. 19 ; 53 & 54 Vict. (1890) cc. 62, 63, 64 ; 56 & 57 Vict. (1893) c. 58 ; 61 & 62 Vict. (1898) c. 26 ; and 63 & 64 Vict. (1900) c. 48) ; *Copyhold Acts* (4 & 5 Vict. (1841) c. 35 ; 15 & 16 Vict. (1852) c. 51 ; 21 & 22 Vict. (1858) c. 94 ; 50 & 51 Vict. (1887) c. 73 ; and 57 & 58 Vict. (1894) c. 46) ; *Conveyancing Acts*, 1881 to 1892 (44 & 45 Vict. (1881) c. 41 ; 45 & 46 Vict. (1882) c. 39 ; 55 & 56 Vict. (1892) c. 13) ;



general nature of the subjects falling within this jurisdiction will be explained in the following chapters.

*As to the relief administered and the procedure adopted*

*Custody of Infants Act*, 1873 (36 & 37 Vict. c. 12); *Guardianship of Infants Act*, 1886 (49 & 50 Vict. c. 27); *Custody of Children Act*, 1891 (54 & 55 Vict. c. 3); *Defence Acts* (5 & 6 Vict. (1842) c. 94; 22 Vict. (1859) c. 12; 23 & 24 Vict. (1860) c. 112); *Ordinance Board Transfer Act*, 1855 (18 & 19 Vict. c. 117), and *Defence Act Amendment Act*, 1864 (27 & 28 Vict. c. 89); *Debts and Liabilities Act*, 1850 (13 & 14 Vict. c. 35 (repealed by *Statute Law Revision Act*, 1883; but see *R. S. C. Order XXXIV. r. 8*)); *Law of Property Amendment Act*, 1860 (23 & 24 Vict. c. 38); *Ecclesiastical Houses of Residence Act*, 1842 (5 & 6 Vict. c. 26), and *Episcopal and Capitular Estates Act*, 1851 (14 & 15 Vict. c. 104); *Fines and Recoveries Act*, 1833 (3 & 4 Will. 4, c. 74); *Grammar Schools Act*, 1840 (3 & 4 Vict. c. 77); *Inclosure Act*, 1845 (8 & 9 Vict. c. 118); *Judgments Act*, 1864 (27 & 28 Vict. c. 112); *Improvement of Land Act*, 1864 (27 & 28 Vict. c. 114); *Lands Clauses Consolidation Act*, 1845 (8 & 9 Vict. c. 18); *Legacy Duty Act*, 1796 (36 Geo. 3, c. 52); *Merchant Shipping Act*, 1894 (57 & 58 Vict. c. 60); *Mortgage Debenture Acts* (28 & 29 Vict. (1865) c. 78; 33 & 34 Vict. (1870) c. 20); *Married Women's Property Acts* (33 & 34 Vict. (1870) c. 93; 45 & 46 Vict. (1882) c. 75; 56 & 57 Vict. (1893) c. 63); *Metropolitan Board of Works (Loans) Act*, 1869 (32 & 33 Vict. c. 102), s. 40, and *Metropolitan Board of Works (Money) Act*, 1888 (51 & 52 Vict. c. 40); *Municipal Corporations Act*, 1882 (45 & 46 Vict. c. 50); *National Debt Acts*, 1870 and 1884 (33 & 34 Vict. c. 71, and 47 & 48 Vict. c. 23), and *Redemption and Conversion Acts* (51 & 52 Vict. (1888) cc. 2, 15; and 52 & 53 Vict. (1889) cc. 4, 6); *Parliamentary Deposits Act*, 1846 (9 & 10 Vict. c. 20); *Petitions of Right Act*, 1860 (23 & 24 Vict. c. 34); *Partition Acts* (31 & 32 Vict. (1868) c. 40; 39 & 40 Vict. (1876) c. 17); *Patents, Designs, and Trade Marks Acts*, 1883 to 1907 (46 & 47 Vict. (1883) c. 57; 48 & 49 Vict. (1885) c. 63; 49 & 50 Vict. (1886) c. 37; and 51 & 52 Vict. (1888) c. 50; now consolidated (except as to trade-marks) by the 7 Edw. 7 (1907), c. 29); *Settled Estates Act*, 1877 (40 & 41 Vict. c. 18); *Settled Land Acts* (45 & 46 Vict. (1882) c. 38; 47 & 48 Vict. (1884) c. 18; 53 & 54 Vict. (1890) c. 69; *Land Tax Redemption Acts* (42 Geo. 3 (1802) c. 116; 16 & 17 Vict. (1853) c. 117); *Trustee Acts*, 1893 and 1894 (56 & 57 Vict. c. 53; 57 & 58 Vict. c. 10), repealing, but (in effect) re-enacting the *Confirmation of Sales Act*, 1862 (25 & 26 Vict. c. 108); the *Trustee Relief Acts* (10 & 11 Vict. (1847) c. 96; and 12 & 13 Vict. (1849) c. 74); *Law of Property Amendment Acts*, 1859 and 1860 (22 & 23 Vict. c. 35; 23 & 24 Vict. c. 38); and the *Vendor and Purchaser Act*, 1874 (37 & 38 Vict. c. 78).

*in equity*.—Procedure in equity is a matter which will be specially treated of, in a later chapter (a); for the present, it will be sufficient, as exemplifying the nature of the relief in equity and the procedure in equity, to notice, with some particularity, the four following subjects of equitable jurisdiction; namely, first, the execution of trusts; second, the specific performance of contracts; third, injunctions; and fourth, the perpetuation of testimony.

1. The means for the protection and enforcement of *trusts*, are, in general, either by action, or by petition; but the relief on summons (originating or ordinary) is also now extensively available. The relief given may be, to compel the trustees to account for trust money received, or which, but for their wilful neglect or default, they might have received; or to compel a sale of the trust property, and a due application of the proceeds of sale under the direction of the court; or to set aside some disposition of the trust property made in breach of trust, and with a guilty knowledge on the part of the purchaser as well as of the trustee. And we ought more particularly to mention proceedings for the *administration of assets*, involving the payment of debts and legacies, and the distribution of residues, out of the estates, whether legal or equitable, of deceased persons, including the due *marshalling* of the assets so as to ensure, as far as may be, the payment of all the beneficiaries in full, and the passing of the accounts of such estates; which proceedings may be instituted either by a creditor, legatee, or next of kin, or even by the personal representative himself, when disinclined to undertake the sole responsibility of administering the assets (b). These proceedings belong wholly to the province of equity; for in a legal action effect can only be given to the claim of a particular creditor, without ever undertaking a general distribution of the assets (c). But it now forms one of the provisions

(a) *Post*, bk. v. ch. xiv.

(b) R. S. C., 1883, O. LV.

(c) 2 Wms. Saund. (6th ed.),

137 (c).

of the Judicature Acts, that, in the administration of the assets of any person who may die after those statutes came into operation, and whose estate may prove to be insufficient for the payment in full of all his debts and liabilities, and in the winding up of any company under the Companies Acts, whose assets may prove insufficient for the payment of the company's debts and liabilities and the costs of winding up, the same rules shall prevail and be observed, as to the respective rights of secured and unsecured creditors, and as to the debts and liabilities provable, and as to the valuation of annuities and future or contingent liabilities respectively, as may be in force for the time being under the *law of bankruptcy*, with respect to the estates of persons adjudged bankrupt (*a*). And further, by a more recent statute, a creditor of a deceased debtor, whose debt would have been sufficient to support a petition in bankruptcy had the debtor been living, may present a petition as if the debtor were living (*b*); and, by a still more recent enactment, a petition may even be presented by the personal representative of a deceased debtor (*c*). In such cases, the bankruptcy jurisdiction may, unless it is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of the debts owing by the deceased, make an order for the administration in bankruptcy of the deceased's estate. And when the Chancery Division is already administering the estate, it may, without a petition being presented, transfer the administration to the court having jurisdiction in bankruptcy (*d*).

2. The Chancery Division exercises also the jurisdiction of decreeing the *specific performance of contracts*, instead of giving redress by way of damages for their non-performance. This mode of relief, indeed, is confined, generally speaking, (and the jurisdiction assigned

(a) Judicature Act, 1875, s. 10.

(c) Bankruptcy Act, 1913, s.

(b) Bankruptcy Act, 1883, s.

21 (3).

(d) Bankruptcy Act, 1890, s. 2.

to the Chancery Division by the Judicature Act is expressly confined,) to contracts and covenants (a) relating to lands ; it not being the ordinary practice in equity to enforce the specific performance of agreements relating to pure personalty, the breach of which latter may, in general, be adequately redressed by an award of damages. But where damages are not an adequate remedy, a court of equity will, as we have previously pointed out (b), enforce the specific performance of contracts relating to personal property. Thus, it will enforce an agreement for the sale of a chattel, where the chattel is of peculiar value to the purchaser, and cannot be obtained elsewhere (c). And it will enforce an agreement for the sale of stock or shares in a railway or other company ; for the amount of such stock or shares is necessarily limited (d).

It is sometimes said, that on a contract for the sale of land the vendor is in equity considered to have become a trustee of the land for the purchaser from the signing of the contract ; and the purchaser to have become as from the same date a trustee for the vendor of the purchase-money. This expression is misleading (e). While it is true that, as from the signing of the contract, the property sold is at the purchaser's risk (f), and that, as from that date, the vendor is bound to exercise reasonable care that it shall not be deteriorated (g), on the other hand the vendor is entitled to the rents and profits of the property until the time fixed for completion, is liable until that time to bear expenses and outgoings in respect of the property, and is not entitled until that

(a) See *Molyneux v. Richard* (1872) L. R. 5 H. L. 321 ; [1906] 1 Ch. 34.

(b) See *ante*, pp. 316–317.

(c) *Fothergill v. Rowland* (1873) L. R. 17 Eq. 132.

(d) *Duncuft v. Albrecht* (1841) 12 Sim. 189.

(e) See *Wall v. Bright* (1820) 1 J. & W. 494 ; *Shaw v. Foster*

(1872) L. R. 5 H. L. 321 ; *Lysaght v. Edwards* (1876) 2 Ch. D. 499 ; *Rayner v. Preston* (1881) 18 Ch. D. 1.

(f) *Vesey v. Elwood* (1842) 3 Dr. & War. 74.

(g) *Clarke v. Ramuz* [1891] 2 Q. B. 456.

time to interest on the purchase-money agreed to be paid (a).

3. With reference to *injunctions*, it is to be observed, that, prior to the Judicature Acts, relief of this equitable nature was almost exclusively to be sought in the Court of Chancery; and in all those cases in which the Court of Chancery could *alone* have originally granted this relief, the action for an injunction should still be brought in the Chancery Division (b), although, now, any division of the Court may, in a proper case, grant this relief, it forming one of the provisions of the Judicature Act, 1873 (c), that an injunction may be granted by an interlocutory order of the Court, in all cases in which it shall appear to the Court to be just or convenient that such order should be made (d). The Act only applies in terms to interlocutory orders; that is to say, to temporary orders made before the final hearing of the action, with a view to maintaining the *status quo*. But as it is settled that any relief which may be given upon an interlocutory application may be given, *à fortiori*, at the hearing, it follows that any decision of the Court (and, indeed, a county court in cases within its jurisdiction) may grant a final injunction if, in the exercise of its discretion, it should see fit to do so. As to the nature of the application itself, it usually seeks to restrain, either till the hearing of the action or permanently, acts in violation of the applicant's rights or alleged rights, *e.g.*, the infringement of a patent or copyright, the commission of waste or nuisance, an obstruction to ancient lights, an interference with the flow of water, the breach of a covenant running with land in equity, the breach of a negative stipulation in an executed contract. In cases of an urgent nature, the injunction may (if the case be

(a) *Birch v. Joy* (1852) 3 H. L. C. 565, p. 591; *Carrodus v. Sharp* (1855) 20 Beav. 56. (c) *Low Leyton* (1877) 5 Ch. D. 347. S. 25 (8).  
 (b) *Flower v. Local Board of* (d) *Beddow v. Beddow* (1878) 9 Ch. D. 89.

supported by a proper affidavit,) be obtained *ex parte*; that is to say, without any previous notice to the opposite side.

The injunction is usually *prohibitory*, but, in exceptional cases, it is *mandatory*, i.e., directly securing the performance of some act, or the restoration of the original *status quo* (a). And a mandatory injunction may be granted on interlocutory application (b).

A court of equity could not, under its original constitution, give damages either for a breach of contract or for a tort; but the Chancery Amendment Act, 1858 (c)—commonly known as Lord Cairns' Act—enabled the Court of Chancery to award damages, either in addition to, or in substitution for, an injunction or specific performance. And, since the Judicature Act, each division of the High Court has a common law as well as equitable jurisdiction to award damages (d); though it seems too much to say that the Court can always give damages where it could grant an injunction, e.g., in cases of merely apprehended wrongs (e).

An injunction also used sometimes to restrain a person from prosecuting his legal action, or from enforcing a judgment he had obtained therein; but, with regard to the Supreme Court, the Judicature Acts have now provided, that no cause or proceeding, pending in the High Court of Justice, or before the Court of Appeal, shall be restrained either by prohibition or injunction. Every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained if the Act had not passed, either unconditionally or on any terms and conditions, may, however,

(a) *Isenberg v. East India House Co.* (1863) 3 De G. J. & S. 263.

(b) *Von Joel v. Hornsey* [1895] 2 Ch. 774.

(c) 21 & 22 Vict. c. 27. This statute was repealed by the Statute Law Revision Act, 1883; but the repeal leaves the jurisdic-

tion of the court unaltered. (See *Higgins v. Betts* [1905] 2 Ch. 210.)

(d) As to the distinction between damages under Lord Cairns' Act and under the Judicature Act, see Ashburner, *Equity*, p. 484.

(e) *Martin v. Price* [1894] 1 Ch., at pp. 284, 285.

now be relied on by way of defence to the action ; and these courts may also now direct a stay of proceedings, in any cause or matter pending before themselves (a). But an injunction may, in a proper case, still issue to restrain the *institution* of legal proceedings in the High Court, or indeed in any court, domestic or foreign (b).

4. The influence of equity is equally important in the *perpetuation of testimony*. The examination of witnesses never used to take place in a legal action, except with reference to matters in respect of which some proceeding had been already commenced ; and the law is so still. But it is sometimes very material for the protection of existing rights, that the evidence relating to them should be taken and preserved, though they may not yet be the subject of any legal proceedings ; the position of the parties interested being such as not yet to afford any opportunity for litigation, though there may be reasons for expecting a future contest of the right, and that at a period when the witnesses, now competent to give material evidence upon it, may have been removed by death (c). In such cases, therefore, the Court of Chancery lent its aid, by permitting any of the parties interested to institute proceedings against the rest, with a view to the mere perpetuation of the testimony, and without reference to any other present relief ; and this was effected by taking down the examinations or depositions of the witnesses, which, in the event of the right being tried at any future period, when the attendance of the witnesses could no longer be procured, was receivable in evidence between the same parties or those claiming under them. With a view to extending the application of so convenient and important a remedy, it was enacted, by the Perpetuation of Testimony Act, 1842 (d), that any

(a) Judicature Act, 1873, s. 24 (5). v. *Connolly Brothers, Ltd.* [1911] 1 Ch. 731.

(b) *Cercle Restaurant v. Lavery* (1881) 18 Ch. D. 555 ; *In re Connolly Brothers, Ltd.* ; *Wood* (c) *Earl Spencer v. Peek* (1867) L. R. 3 Eq. 415.  
(d) 5 & 6 Vict. c. 69.

person who, upon the happening of any future event, would (under the circumstances alleged by him to exist) become entitled to any honour, title, dignity, or office; or to any estate or interest in property real or personal, the right or claim to which could not by him be brought to trial before the happening of such event, might take proceedings in equity, to perpetuate any testimony material for establishing such claim or right; and though this enactment has been repealed as to England (a), its provisions have, in effect, been reproduced in the Rules of the Supreme Court (b).

There is, moreover, one fundamental distinction between law and equity, which has not always been sufficiently adverted to. The common law, whether in actions for breach of contract or in actions of tort, is guided, in fixing the damages, by the loss sustained by the plaintiff. On the other hand, where a court of equity grants an account, the account is invariably an account of moneys which have been received by the person against whom the account is directed, or which, but for his wilful default, would have been received by him, or of profits which he has made, or which, under the doctrine of the court, he is estopped from denying that he has made. That is to say, the primary object of a court of equity is, not to restore property to the plaintiff which has been wrongfully taken from him, or to compensate him in damages for its loss; but to deprive the defendant of property which it is against conscience for him to retain. The property which is so taken from the defendant necessarily goes to the plaintiff; but the relief given to him is incidental. And he may, under the operation of the equitable doctrine, obtain an advantage which would not have accrued to

(a) Statute Law Revision Act, 1883, s. 3. *Marquis of Bute v. James* (1886) 33 Ch. D. 157.

(b) O. XXXVII. rr. 35-38;



him, if the only object of the court had been to repair the wrong in respect of which he seeks redress (a).

Finally, it should be observed that the effect of the Judicature Acts, and of the so-called 'fusion of law and equity' which they brought about, has not been to diminish in any respect the necessity for discriminating between legal and equitable claims, and between legal and equitable defences. The object of the Judicature Acts was, to avoid multiplicity of legal proceedings, and to ensure that, where A. had a claim against B., A.'s claim, and any counterclaim of B. which was naturally connected with A.'s claim, might be disposed of, exhaustively and conclusively, in one single proceeding; whether the claims were legal or equitable, or one legal and the other equitable. The object of the Acts was not, except as regards certain specified particulars which have already been referred to (b), to alter the principles on which the courts of law and equity had respectively proceeded before the fusion took place (c). It follows that a legal claim can only be met—after the Acts as well as before—by a legal defence, or by some equity which, before the Acts, would have justified the issue of an injunction to restrain proceedings at law on the claim. While, on the other hand, an equitable claim may be met by equitable defences, or an equitable claimant may be put upon equitable terms; and an equitable title cannot be enforced against a legal title which it has no ground in conscience to supersede (d).

(a) See this point illustrated in Ashburner, *Equity*, pp. 51–54; *Parker v. M'Kenna* (1874) L. R. 10 Ch. 96.

(b) See *ante*, pp. 350–351.

(c) But an alteration in procedure may, incidentally, bring about an alteration which looks,

at first sight, like an alteration of principle. Thus, discovery may now be obtained against a purchaser for value without notice. (See Ashburner, *Equity*, p. 70.)

(d) See *ibid.* pp. 22–24.

## CHAPTER III.

## OF THE GENERAL PRINCIPLES OF EQUITY.

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FORMERLY it was customary to divide the matters which came within the jurisdiction of the Court of Chancery into (1) those which came within its exclusive jurisdiction, (2) those which came within its concurrent jurisdiction, and (3) those which came within its auxiliary jurisdiction; and, as we have seen, even so recently as the passing of the Judicature Act, 1873 (a), some trace of this classification survived. And, though the classification has ceased to be true as regards actual procedure, yet its previous existence still has practical consequences of an important kind. It will, therefore, be wise to give some explanation of it.

Under the head of the *exclusive* jurisdiction of Chancery were included all matters which might sustain a suit in equity, but which did not give rise to a cause of action in any court of law. Of these, the most typical and important were matters connected with the administration of trusts, which, as we shall shortly see, were entirely the creation of the Court of Chancery itself. In the second or *concurrent* division, were placed matters in which relief could be obtained in some other court besides a court of equity. Thus, questions arising out of fraud, mistake, or partnership, came equally within the equity and the common law jurisdiction; and matters connected with deceased persons' estates equally within the jurisdiction of equity and of the ecclesiastical courts. Gradually this branch of the jurisdiction of equity was held to include all matters in which the Court of Chancery could give a more complete or effectual remedy than a

(a) S. 34. (See *ante*, pp. 351-352.)

court of law. As to matters coming within this branch, the Court of Chancery decided for itself the validity of the legal right involved, and decided it, in general, upon legal, not equitable, principles (*a*). In the third, or *auxiliary* division were placed matters in which the Court of Chancery gave its aid to secure the proper trial in another court of some other matter over which itself claimed no jurisdiction. Thus, the Court would help the trial of a question of contract or tort in a court of common law, by ordering discovery of documents. Bills to preserve testimony, and interim injunctions till the trial of actions at law, were also common examples of these matters.

*Equitable and statutory amendments of the law.*—However, it seems no longer desirable to frame an exposition of the matters subject to the rules of equity upon this old system of classification. In the present work, it is especially undesirable; since equitable remedies and equitable procedure form the subject-matter of another chapter (*b*). We are here dealing with the substantive part of equity only. That part consists entirely of amendments of the common law of the country; and in this respect has had, in the result, much the same effect as a series of statutes. But it differs from a series of statutes in two respects. In the first place, when a statute is passed amending the common law, it puts an end to the common law as far as it amends it, and substitutes the law enacted by the statute in its place (*c*). Equity, on the other hand, attained the same result, not by putting an end to the common law, but by preventing its operation, and, instead of substituting, superadded its amendments to it. In the second place, the amendments made by

(*a*) *Colls v. Home and Colonial Stores, Limited* [1904] A. C. 179.

(*b*) See *post*, ch. xiv.

(*c*) *Bank of England v.*

*Vagliano Brothers* [1891] A. C. 107; *New Windsor Corporation v. Taylor* [1899] A. C. 41.

statute have proceeded on no very definite principles. No doubt the history of legislation in England shows various tendencies in law reform, more or less marked, and more or less consistently followed. But, in the end, alterations of the law by statute are decided simply by the opinion of the legislature, which changes with the varying interests and views of those who control it. Much the same might have been, and, indeed, was said at one time (a), of the amendments made by equity; but before long the decisions of the different chancellors were consistent enough to disclose that they proceeded on certain general principles. Those principles were gradually refined, and, even until very recently, from time to time greatly extended in their operation; but in essentials they have remained, since Lord Hardwicke's time at least, practically unaltered, save where the legislature has changed them, as it has changed the common law (b).

These two differences make it possible to arrange the alterations made by equity in the substantive law of England, in a more systematic way than the alterations made by statute can be arranged. The only arrangement of statutory reforms that the ingenuity of text-book writers has so far discovered, is the primitive if convenient one called the alphabetical. The alterations made by equity can, however, be arranged according to the general principles which gave them birth, and have since controlled their growth. A clear conception of these will give the student a systematic view of the subject, and enable him to understand some subordinate doctrines and positions of equity, which might otherwise appear to him somewhat peculiar.

*The first general principle of equity.*—The first, then, of these general principles or maxims of equity, as they

(a) Selden, *Table Talk*, tit. *Equity*, cited *ante*, p. 350 (b).

(b) See, however, a somewhat different view of the development of equity expressed by the late Sir George JESSEL, M.R., in *Re Hallett* (1879) 13 Ch. D., at p. 710.

are called, which we will consider, is this : *Equity acts in personam*. By this is meant that courts of equity, in questions as to property, with which they were and are chiefly concerned, did not, originally at any rate, interfere with the legal property itself, but merely with the legal owner—that is, the owner by the common law. However inequitable the title of the legal owner, in their opinion, was, they never attempted to take the property from him by their decree. What they did do was, to order him to hold it for the benefit of, or to transfer it to, the rightful owner. If he refused to obey this order, all that the courts of equity could do originally was, to attach him personally for contempt of their orders, and imprison him until he purged his contempt, or, in other words, did what he had been ordered to do. In early times, the courts found that occasionally this remedy was insufficient ; stubborn persons would now and then refuse to obey their orders, and defy the courts to do their worst. So the courts of equity were obliged to resort to other means of coercion. First they tried fines. Then, by writ of assistance, they put the person rightfully entitled to the property in dispute (or *in suit*, as it was called) in possession, and preserved him there ; without, however, affecting to transfer the legal title. And later, by a writ of sequestration, they directed the property in dispute, and afterwards all the property of the person in contempt, to be seized and retained till the latter purged his contempt (a). Now, under Order XLVII. of the Rules of the Supreme Court, the judgment of a court of equity can be enforced, like that of a judgment of a court of law, by writ of possession ; and, under Part III. of the Trustee Act, 1893, the courts may, in proper cases, make orders vesting the legal title to the property in those rightfully entitled to it, or appoint a person to convey it to them. But still, the foundation of the whole system of equity

(a) See Ashburner, *Equity* (pp. 38–45), for a very interesting and learned account of the development of the process of equity.

was and is, that a court of equity acts *in personam*; and in matters affecting the decision, rather than the enforcement of rights, this principle still governs the court in dealing with equitable claims.

*Equitable interests.*—By the application of this principle, courts of equity were enabled to create a new system of ownership and interests in property, unknown to the common law, and altogether beyond its jurisdiction. If a man were in possession of property under circumstances which conferred upon him the ownership of it at common law, the common law courts had no option but to treat him as entitled to all the rights of user and disposition which common law ownership conferred. Courts of equity also recognised his common law ownership; but as to the rights of user and disposition, if he obtained or retained the common law ownership under circumstances which in their view conferred these rights on another person, they ordered and compelled him to permit this other person to enjoy them. When this occurred, clearly the common law ownership became a mere husk; all the fruit of real ownership going to the person for whose benefit the courts of equity directed the common law owner to hold. Still, at first, there was doubt as to the nature of that person's right—whether it was merely a personal right against the legal owner, or an interest in the thing owned (*a*). Ultimately, it was held to be an interest in the thing owned; but we shall shortly see

(*a*) A good example of this distinction is shown in the common law and equitable views respectively of the position of an executor. The common law regards the executor as the absolute owner of his testator's estate. If he gives it away, the donee takes a perfectly good title. All that the legatees have is an action in damages against

the executor. Equity, on the other hand, regards the legatees as the real owners of the testator's estate. If the executor gives it away, they can follow it and claim it from the donee. (See Strahan and Kenrick, *Digest of Equity*, pp. 504 *et seq.*; *Lacons v. Warmoll* [1907] 2 K. B. 350; *Solomon v. Attenborough* [1913] A. C. 76.)

that, to this day, it has still some of the characteristics of a personal right against the legal owner.

*Equity follows the law.*—As soon as the right of the person entitled in equity was recognised as an interest in the thing owned, the courts began to apply another principle—that, as regards equitable interests, ‘equity follows the law.’ By this was meant that, in general, equity would treat the equitable interest in a thing, as having the same incidents as the legal estate or interest. Thus, an equitable interest in land might be either a fee simple, a fee tail, a life estate or a leasehold; and each interest, on the death of its owner intestate, devolved precisely as the analogous legal estate would have devolved. So much was this the case, that if there were any special custom of descent annexed to the land (such as affects lands held in gavelkind (a) or borough-english); it affected the equitable interest, as much as the legal estate. And an equitable fee tail could be barred only by the same ceremonies as the legal fee tail. In the same way, an equitable fee simple, like a legal fee simple, might (only, until the Act for the Abolition of Military Tenures, 1660, in a much freer way) be devised by the will of its owner, or limited out in estates in succession, or alienated *inter vivos*, or mortgaged. Not content with this, equity permitted the creation of equitable easements, which may run with the equitable interest in the land, just as legal easements may run with the legal estate (b), and which affect the owner of the legal estate just as other equitable interests affect him (c).

(a) Though the peculiar descent of land held in gavelkind may be treated as a custom, it must be remembered that gavelkind is not a custom, but is the common law of Kent. (See *Re Chenoweth* [1902] 2 Ch. 488.)

(b) *L. & S. W. Ry. Co. v. Gomm* (1882) 20 Ch. D., at p.

583, *per* JESSEL, M.R.

(c) *Tulk v. Moxhay* (1848) 2 Ph. 774; *Rogers v. Hosegood* [1900] 2 Ch. 389. And see the case of *Re Nisbet and Pott's Contract* [1905] 1 Ch. 391; Stra. L. C., p. 45) which assumes that an equitable easement may survive the legal estate out of

In the same way, equitable interests in chattels real and personal devolve at the death of their owner on his executors or administrators, just as legal interests do, and generally have the characteristics of legal interests.

*Where equity did not follow the law.*—But though, in general, in declaring the incidents of equitable interests, courts of equity followed the law, yet they were under no compulsion to do so. Equitable interests were their own creatures, and they could impress upon them what characteristics they chose; and, when they saw good reason for so doing, they did not follow the law. Indeed, it is hardly too much to say, that the original motive for the creation of equitable interests, in freehold lands at any rate, was in order to free them from the fetters which the law, as it then stood, had imposed upon them.

The most important points upon which equity, in declaring the incidents of equitable interests, did not follow the law, were as regards (1) incidents arising out of seisin; (2) interests in chattels personal; and (3) the disabilities of married women.

(1) *Incidents arising out of seisin.*—It is commonly said, that the reason why equity did not attach these incidents to equitable interests in freeholds was, because the seisin of the land was not in the equitable owner, but in the legal owner. It would be perhaps more accurate to say, that this was the reason why equity was able to prevent such incidents attaching. As has been pointed out, equitable interests owe their birth largely to the desire to escape from such incidents; and there is no doubt, that if courts of equity had considered these incidents desirable, they would have attached them to equitable interests,

which it was created. Under s. 11 of the Conveyancing Act, 1911, provision is made for the indorsement of notice of equit-

able easements on the title deeds of the grantor; in order that subsequent purchasers from him may have notice of them.



seisin or no seisin. Some of them, such as dower (a), and escheat (b) have now been attached by Act of Parliament, so far as the nature of the incident renders this possible.

Alienation by feoffment was one of these incidents. A legal freehold in possession could not be transferred *inter vivos*, except by means of a feoffment with livery of seisin (c). Every equitable interest in freehold, save a fee tail, could originally be transferred without any ceremony, and even without writing. The Statute of Frauds, 1677, made writing necessary (d); but a deed is seldom necessary, though always used in practice. An equitable fee tail can, however, be alienated only by an enrolled deed, just like a legal fee tail (e).

Another incident arising out of the doctrine of seisin was the liability of contingent remainders to fail, if the preceding estate of freehold determined before they were ready to vest in possession. This incident equity again refused to adopt. If the estate preceding a contingent equitable remainder failed before the latter was ready to vest, the remainder did not fail, but simply continued ownerless till it vested under the settlement. To this there was no legal objection; because it did not involve 'abeyance of the seisin,' which remained, all the while, in the trustee, who simply held it, for the time being, discharged of the trust. Originally, no time was fixed before which it must vest; but at last Lord Nottingham invented the Rule against Perpetuities (f). If the contingent remainder was so limited that it might possibly

(a) Dower Act, 1833, s. 2.

(b) Intestates Estates Act, 1884, s. 4.

(c) See *ante*, vol. i., pp. 401 *et seq.*

(d) S. 9.

(e) Fines and Recoveries Act, 1833, s. 47.

(f) *Ante*, vol. i., pp. 439–441.

S.C.—III.

It has now been decided that the rule against double possibilities also applies to equitable remainders (*In re Nash* [1909] 2 Ch. 450). As to the application of the rule against perpetuities to interests, legal or equitable, arising under powers, see *In re Fane* [1913] 1 Ch. 404.

not vest within a life or lives in being and twenty-one years after, as that rule required, it did not fail, but was void *ab initio*...

A third point arising out of seisin, on which equity did not follow the law, was as regards escheat (a). On the death of a legal tenant in fee, intestate and without heirs, his lands escheated, or reverted, to the lord from whom they were held, who is now assumed to be the King, until it is shown that the tenant held from a mesne lord. On the other hand, on the death of the owner of the equitable interest, intestate and without heirs, there was no escheat; but the equitable interest became merged in that of the owner of the legal estate—called the *terre tenant*—who henceforth held the land for his own benefit (b). By the Intestates Estates Act, 1884 (c), however, it is now enacted that the law of escheat shall apply to equitable estates and interests, in the same manner as if the estate or interest were a legal estate in corporeal hereditaments. This enactment probably means, that the law of escheat will apply, as if the equitable interests were the legal fee simple in the hereditaments in question (d).

It is true that, although the Court of Chancery finally laid it down, in *Burgess v. Wheate* (e), that there would be no escheat of an equitable interest, the equitable owner long remained subject, though not without some difference of opinion (f), to the danger of losing his rights by escheat of the legal estate of his trustee. For, in such an event, the lord who took by escheat, as he did not claim *under* the trustee, but by a superior title, was not bound by the trust. But this liability was removed by the Trustee Act, 1850 (g).

(a) Strahan, *Law of Property*, p. 295.

(b) *Burgess v. Wheate* (1759) 1 Eden, 177.

(c) S. 4.

(d) See *Re Wood* [1896] 2 Ch. 596.

(e) (1759) 1 Eden, 177.

(f) *Pawlett v. A.-G.* (1667) Hardres, 465; *Eales v. England* (1702) Pre. Ch., at p. 202; *A.-G. v. Duke of Leeds* (1833) 2 My. & K. 343.

(g) Ss. 15, 19, 46. (See

(2) *Interests in chattels personal*.—At common law, chattels personal could only be the subjects of absolute ownership. The absolute ownership might, it is true, be divided up between two persons. One might be entitled to the possession of the chattel, and the other to all the remaining rights of ownership in it. That is the state of things which arises on a bailment of goods. But the ownership could not be divided up in *successive portions*. A horse, for instance, could not be given to A. till the end of the year and then over to B. ; nor could a valuable security be limited out to A. for life, and on his death among his children equally. A gift of a chattel personal for life gave the donee the whole property in it.

This rule equity altogether disregarded. It permitted successive interests to be created in the equitable interest in goods, at least as freely as the common law allowed successive estates to be created in land. It is true it followed the law to this extent. As long as the equitable interest in goods was personalty, it would not permit it to be divided up into interests which at law could subsist only in realty. Thus, the equitable interest in chattels, while such interest was personalty, could not be limited out into heritable interests—that is, interests which would, on the death of the owner, descend to the heir. If the equitable interests were limited to A. for life, and on A.'s death to A.'s eldest son and the heirs of his body, then, on A.'s death, his eldest son took, not an estate to him and the heirs of his body, but the absolute interest in the equitable interest in the goods (a). This rule, however, only applied so long as the equitable interest in the chattels was personalty.

But the equitable interest in chattels might be realty. Thus, if securities were transferred to a trustee with directions to sell them and invest the proceeds of the

further as to the characteristics of equitable interests in land, *ante*, vol. i., pp. 253–258.)

(a) See Underhill and Strahan, *Interpretation of Wills*, p. 218.

sale in land, the equitable interest in the securities would be realty, though no sale or investment ever actually took place. The securities would be, in the technical phrase, *converted* into realty, so far as the equitable interest in them is concerned, from the moment they were transferred to the trustee. This equitable interest then could be limited out into estates for life, in fee tail, and in fee simple; and, on the death of the owner of a heritable interest intestate, it would devolve on the heir general or heir in tail, just as if the equitable interest was the legal estate in freehold land. In the same way, a direction to a trustee to sell freehold land, and invest the proceeds in securities, will, from the time that the duty (a) to sell arises, change the equitable interest in the land into personalty, which can be limited out only into life interests and absolute interests, like the equitable interest in unconverted personalty, and will on death devolve as personalty (b). And conversion may be brought about without any direction (c). On making a contract for the sale of freehold lands, the vendee becomes in equity the owner of the lands; and the vendor is entitled merely to a lien upon them for the purchase money (d). In equity then, the vendor's interest in the lands of which he is, till the conveyance, legal owner, is regarded as personalty; while the vendee, who in law has only a right to damages if the vendor refuses to carry out the contract, is regarded as the owner of the lands. On the death of either, his equitable interest will descend according to its nature in equity (e).

This doctrine of conversion is based on the equitable maxim that *equity regards that as done which ought to have been done*.

(a) *Re Grimthorpe* [1908] 2 Ch. 675.

† (b) A power of sale only converts from its exercise (*In re Dyson* [1910] 1 Ch. 750).

(c) As to the modes in which conversion may arise, see Stra-

han and Kenrick, *Digest of Equity*, pp. 216–218.

(d) See Ashburner, *Equity*, p. 344.

(e) *Bubb's Case* (1678) Freem. Ch. 41. And see *Re Thomas* (1886) 34 Ch. D. 166.

Now, where a trust instrument directs conversion of the trust property for certain purposes, the trustee ought to convert so far as is necessary for those purposes ; and so far only. Accordingly, if such purposes fail wholly he has no duty to convert at all ; and in equity—whether in fact he converts or not—there is no conversion. And if the purposes fail only partially, then he has no duty to convert except to the extent of those purposes ; and so far only is there any conversion in equity. Thus, for example, A. by his will leaves Blackacre in trust to convert and divide the proceeds among X., Y., and Z. Now, if X., Y., and Z. predecease A., the trust in their favour fails, and there is no duty to convert. Blackacre will then go to A.'s residuary devisee or heir. If, on the other hand, Z. alone predeceases A., then there is no duty to convert Z.'s share ; and his share of Blackacre or of the proceeds of the sale of Blackacre, will go to A.'s residuary devisee or heir (a).

But often, especially in the case of trusts created by will, a further question arises : *viz.* in what character does the property, as to which the trust has failed, go to the person entitled to it on such failure—as land or as money ? This depends upon whether the failure of the trusts is complete or partial. If they fail wholly, no matter whether land has been in fact sold or not, the trust property reverts as land. If they fail partially, then, whether the land has been sold or not, it reverts as money. Take the example given above. Where X., Y., and Z. all predecease A., Blackacre, or the proceeds of Blackacre, will result to A.'s residuary devisee or heir *as realty* ; and if such devisee or heir die before he actually gets in the property, it will devolve on *his* devisee or heir, as realty (b). Where, however, only Z. predeceases A., then, if A.'s residuary devisee or heir dies before he actually gets Z.'s share of

(a) *Ackroyd v. Smithson* (1780)  
1 Bro. C. C. 503,

(b) *Smith v. Claxton* (1819) 4  
Madd. 492,

Blackacre, or of the proceeds of Blackacre, the property will devolve on *his* legatee or next of kin, as personalty (a).

The same rule would apply had the settlement been by deed; subject to this difference, that the person to whom the property would originally revert would not be the settlor's devisee or heir as in the case of a will, but to the settlor himself. Take this example. B. by deed settles Blackacre on himself for life, and then on trust to sell and divide the proceeds among his children, C., D., and E., if they survive him, in equal shares. If C., D., and E. all predecease B., the trust for conversion wholly fails (b); Blackacre results to B., and, on his death, will go to his devisee or heir by devolution from him. If E. only predeceases B., then E.'s share will revert to B.; and, on his (B.'s) death, will go to B.'s legatee or next of kin. As, however, trusts arising under deeds seldom wholly fail, and as the trust property in the case of partial failure is seldom or never got in during the settlor's life, it is often inaccurately said that, while in a will a direction to convert converts only for the purpose of the will, in a deed such a direction converts the whole trust property immediately.

The rule above stated applies, *mutatis mutandis*, to trusts for investment of money in the purchase of freehold land (c).

(3) *Disabilities of married women*.—As has already been explained, at common law married women were incapable of holding personalty, or disposing of property (d). This disability was altogether disregarded in equity. The equitable interest in land or goods could be effectively vested in a married woman; and she could freely dispose of it *inter vivos* and by will. Her rights in equity have been sufficiently stated in the chapter dealing

(a) *Re Richerson* [1892] 1 Ch. 379.

(b) *Re Grimthorpe* [1908] 2 Ch. 675.

(c) *Curteis v. Wormald* (1878) 10 Ch. D. 172.

(d) See *ante*, vol. ii., pp. 408–421.

with husband and wife (a); and it is necessary here only to refer to this as another point upon which equity did not follow the law, but impressed on the equitable interests characteristics which it regarded as more consonant with justice.

*Equity acts on the conscience.*—The second general principle of equity which we will consider is this: *equity acts on the conscience*. In other words, a court of equity was originally a court of conscience. Where a person obtained or retained property under circumstances which made it contrary to conscience that he should himself enjoy it, the court compelled him to hold for the benefit of the person or persons rightfully entitled. And any one applying to the court for its assistance to obtain what rightfully belongs to him, must begin himself by doing what is right. That position is summed up in the maxim: *who seeks equity must do equity*.

Now there is this difference between matters of conscience and matters of law. Law in general binds persons, quite irrespective of their knowledge of it or not. This rule is sometimes expressed by the maxim: that every one is presumed to know the law—a somewhat hypocritical fiction invented for the purpose of identifying law and morals. However, this much is certain; whether a person knows or does not know the law, it binds him. If I buy land to which the vendor has a title bad in law, that title will not be improved because I thought it was good. But, in matters of conscience, knowledge makes the whole difference between right and wrong. If I buy land to which the vendor has a title good at law, not knowing that the vendor is bound in conscience to hold it for the benefit of some one else, I do nothing against fair dealing; if I do know this, I make myself party to the vendor's fraud.

Courts of equity, then, being courts of conscience, this

(a) See *ante*, vol. ii., pp. 414-416.

principle, as might be expected, bulks largely in their jurisprudence. It is the *fons et origo* of what is known technically as the *doctrine of notice*. That doctrine may be summed up in three short propositions. The first is this: *When a person has obtained for value a title good at law to any property, his legal rights as owner will not be affected by any equitable rights binding on the previous owner, unless at the time of purchase he had notice of such rights.* The second is this: *A person has notice of equitable rights when he actually knows of, or has reasonable grounds to suspect, or might, if he had made the inquiries usual in such transactions, have discovered, the existence of those rights.* The last proposition is based on the practical consideration, that in such transactions the investigation of title is, as a rule, not made by the purchaser or mortgagee, but by his skilled agent. It may be thus stated: *Notice acquired by the agent as agent in carrying through the transaction is notice to the principal (a).* We will consider shortly each of these propositions.

1. The first point to be noted in the first proposition is, that the person obtaining the legal title must have given value for it. A title bad in equity cannot be improved by the transfer of the legal title to a volunteer. The principle is, that it is only where equities are equal that the legal title shall prevail; and, as between the person entitled to equitable rights in a thing, and the person who takes the legal title to it as a gift, the equities are not equal. In the second place, the title he obtains must be good in law. By this is meant, that he must have obtained the legal title of the vendor, not that the title must be good in law absolutely. A possessory title is good in law as against equitable rights affecting its previous holder (b). Lastly, the person taking the legal title must not have the notice before or at the time

(a) Conveyancing Act, 1882, s.  
3 (1) (ii).

(b) *Jones v. Powles* (1834) 3  
My. & K. 581.



he gives the value (a). That is usually the time when the legal title is conveyed to him ; but it need not be so. Not infrequently mortgagees lend money on equitable mortgage without notice that other equitable mortgages already exist. Here if, after the money is advanced, they, having learnt in the meantime of the preceding equitable mortgages, obtain a conveyance of the legal estate from the person having it, or even a declaration of trust of it in their favour, this will entitle them to rank in priority to those other equitable mortgagees, whose mortgages preceded theirs in point of time (b). This rule applies in every case ; save where the holder of the legal estate, to the knowledge of the mortgagees, holds it under circumstances which would make his transfer of it to the puisne (or later) mortgagees, a breach of trust (c).

It should be added, that notice only affects the person receiving it. If the latter afterwards transfers his legal title for value to another person who has no notice of the prior equitable rights, such person is not affected by them. Nor even is the first person affected, if he subsequently *bond fide* takes a re-transfer for value from the person who gave value without notice ; unless, in the words of JESSEL, M.R., he is a “ trustee buying back trust property “ which he has sold, or a fraudulent man who has acquired “ property by fraud ” (d).

2. Notice is of two kinds. The first is called *actual notice* ; that is, where the person taking the legal title had positive knowledge of the existence of the equitable rights (e). The second is called *constructive notice* ; that is, where the person taking the legal title has knowledge of facts which reasonably suggest the probable existence of the equitable rights, or where, if he had made proper

(a) *Tourville v. Naish* (1734) 3 P. Wms. 306 ; *Jared v. Clements* [1903] 1 Ch. 428.

(b) *Brace v. Duchess of Marlborough* (1728) 2 P. Wms. 491.

(c) *Taylor v. Russell* [1892]

A. C., at p. 259.

(d) *Barrow's Case* (1880) 14 Ch. D., at p. 445.

(e) Conveyancing Act, 1882, s. 3.

inquiries, he would have discovered their existence (a). Of actual notice nothing need here be said. Of constructive notice a few examples may be given. Thus, knowledge of the existence of a trust deed affects the taker of the legal estate with notice of all terms of the deed (b). Knowledge that the title deeds of the person giving the legal title are in the possession of a stranger, affects the person taking the legal title with constructive notice of such stranger's rights (c). Knowledge that land is in possession of a tenant, gives constructive notice of the tenant's rights; and knowledge that such tenant pays his rent to a stranger who is not a mere rent or estate agent, gives constructive notice of such stranger's rights (d). But, on the other hand, knowledge that the title deeds are not in the possession of the person giving the legal title is not (if they are in fact in the hands of a stranger) constructive notice of this, or of such stranger's rights; if the person taking the legal title made inquiries about them, and received a reasonable explanation of their absence.

3. The law as to notice to an agent being notice to his principal, sometimes called *imputed notice*, is now stated in the Conveyancing Act, 1882 (e). That statute enacts, that a purchaser shall not be prejudiced by notice of any instrument, fact, or thing; unless in the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel *as such*, or of his solicitor or other agent *as such*, or would have come to the knowledge of his solicitor or other agent *as such*, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or agent (f).

(a) Conveyancing Act, 1882, s. 3.

(b) *Cothay v. Sydenham* (1788) 2 Bro. C. C. 391; *Knight v. Bowyer* (1858) De G. & J. 421.

(c) *Dryden v. Frost* (1838) 3 My. & Cr. 670.

(d) *Hunt v. Luck* [1902] 1 Ch. 428.

(e) S. 3.

(f) See *Espin v. Pemberton* (1859) 3 De G. & J. 547; *Taylor v. London and County Banking Company* [1901] 2 Ch. 231.

*Equitable priorities.*—Where the equities are equal, and one of the owners, having an equal equity, has also a legal title, the principle that *where equities are equal the law shall prevail* applies. Where, however, all have merely equitable interests, the rule is : *qui prior est tempore, potior est jure*. This principle, however, like the preceding one, is not applicable, except where the equities are really equal. Where, through the fraud or gross negligence of a person having the equitable precedence, or even having the legal title, the original owner is enabled to perpetrate a fraud, the person who suffers from the fraud is entitled to have a charge on the property, in precedence of the person who had a prior charge or title, but by whose fraud or negligence the original owner was enabled to commit the fraud (a).

The principles which control the amendments of the law effected by the courts of equity will, from what has been said, be seen to be primarily two. The first is that *equity acts on the conscience*, and the second—which, strictly speaking, is only a corollary from the first principle—that, *he who seeks equity must do equity*. Assuming these as our basis for arranging the subject-matter of these chapters on equity, it would appear that the first principle has two applications. One is where the conscience is affected on account of an express confidence reposed in it. That will form the subject-matter of our next chapter, and will be called *Equities arising from Actual Confidence*. The other is where the conscience is affected, not by any express confidence, but on general principles of fair dealing. That will form the subject-matter of the succeeding chapter, and will be called *Equities arising from Constructive Confidence*. The last part of our subject will turn on the principle just stated—that he who seeks equity must do equity. And that we will call *Reciprocal Equities*.

(a) *Rice v. Rice* (1853) 2 Drew. 73 ; *Walker v. Linom* [1907] 2 Ch. 104.

## CHAPTER IV.

## OF EQUITIES ARISING FROM ACTUAL CONFIDENCE.

*Trusts.*—Equities or equitable interests which arise out of actual confidence reposed in, or the actual undertaking of, the nominal owner of the property in which the equities subsist, are called ‘trusts.’ That term is commonly extended also to every case where the nominal owner in law or equity of the property is not the beneficial owner. But while it is difficult to suggest any term more suitable than ‘trust’ for the relationship of, for instance, the vendor of property and the vendee, or even the mortgagee of property and the mortgagor, yet this use of the same term to denote really different relationships is greatly to be deplored. The obligations of the parties to a trust arising out of an actual confidence or undertaking, are very different from those of the parties to a so-called trust which does not arise out of actual confidence or undertaking, but is purely the creation of rules of law (a). In what is now said it must be understood that trusts in the natural sense of that word, in the sense of equities arising out of actual confidence, are alone referred to.

We have used the phrases ‘nominal owner’ and ‘beneficial owner,’ in referring to trusts in the sense in which we are now using that word. It seems that this phrase is much more accurate than that ordinarily employed, viz. ‘legal owner’ and ‘equitable owner.’

(a) For instance, see, as to 710; and, as to mortgagee and vendor and purchaser, *Wall v. mortgagor*, *Kennedy v. De Trafford* [1897] A. C. 180; *Nutt v. Cornwall v. Henson* [1899] 2 Ch. *Easton* [1900] 1 Ch. 29.

There is no reason in the world why a trust should not be created by an equitable owner ; and, as far as trusts of land are concerned, the usual experience is that they are as often created out of the equitable as out of the legal estate. A large proportion of the land of England is subject to legal mortgages. The mortgagee is the legal owner of mortgaged land, and the mortgagor has only an equitable interest in it. Yet, most of this mortgaged land is held in settlement in trust for the family of the mortgagor. In such cases it is most misleading to describe the mortgagor's trustees as the legal owners, or as having the legal estate.

The subject of trusts naturally divides itself into two parts ; first, the nature of trusts, and, second, the administration of trusts. The former of these, as it contains most of the principles relating to trusts, is, for the student, the more important ; though the latter, dealing as it does with the practical application of the law, is at least as important to the practitioner. These volumes being intended primarily for students, we will deal at greater length with the former part.

## PART I.—THE NATURE OF TRUSTS.

*Analysis of a trust.*—Most attempts to define trusts have been of little service to the student. It seems more expedient not to attempt what so many others have failed to accomplish, and to content ourselves with explaining the relationship between the parties, which is constituted when a valid trust arising out of actual confidence or undertaking is established (a).

Now to the constitution of a trust three parties—not

(a) As a convenient, but not exhaustive definition, it may be suggested that a trust in English law is : “ An obligation to hold and administer or deal with property conscientiously for

“ the benefit of another person “ or persons.” The trustee himself may be also a *cestui que trust*, but not sole trustee and sole *cestui que trust*.—E. J.

persons, it is to be noted—are necessary. The first is the party who is the beneficial owner (a) of the property about to be subjected to the trust ; that is, the party who, in the words of the Statute of Frauds, 1677 (b), is by law enabled to declare the trust. This party provides the property to be ‘settled in trust,’ which, on settlement, is called the *trust property* ; and he is therefore called the *settlor*. The next party is the party in whom the trust property is, by the act of the settlor, nominally vested. By nominally vested is meant, that where the settlor had not merely the beneficial interest, but also the legal estate in the property, the settlor confers on him the legal title, and that where the settlor had only the equitable interest he confers on him the equitable title to the trust property ; but in neither case does the title carry with it the right to the beneficial interest in the property. This beneficial interest—the right to enjoy the trust property—he has undertaken to hold for the benefit of some one else ; and therefore he is called a *trustee* of it. The third party is the party for whose benefit the property is held ; and he is therefore called the *cestui que trust*, or *beneficiary*. As a rule, the trust property is not merely held for the benefit of the *cestui que trust* ; but he is also entitled in equity to it. This, however, is not the case always. In what are known as ‘illusory trusts,’ or ‘trusts of imperfect obligation’ (such as trusts for the payment of the settlor’s creditors (c) and trusts for the benefit of animals (d) ) the *cestui que trust* has no claim in law or equity to the beneficial interest in the trust property. Charitable trusts, again, can be enforced only by the Crown ; and trusts *in fieri* only by parties to the consideration (e). This helps us to define the position of the trustee and *cestui que trust*. The trustee is the party who holds the trust property, but

(a) *Tierney v. Wood* (1854) 19 Beav. 330 ; *Kronheim v. Johnson* (1877) 7 Ch. D. 60.

(b) 29 Car. 2, c. 3, s. 7.

(c) *Field v. Donoughmore*

(1841) 1 Dr. & War. 227.

(d) *Re Dean* (1889) 41 Ch. D. 552.

(e) See *post*, p. 390.

who, as *trustee*, cannot derive any benefit from it. The *cestui que trust* is the party for whose benefit the trustee holds the trust property, but who may or may not have a right in equity to compel the trustee to permit him to enjoy such benefit.

As has been pointed out in our explanation of the relationship between the parties to a trust, by 'party' is not always meant 'person.' Each party to a trust may consist of several persons; and one person may in himself constitute two, and even, to a certain extent, the three parties. Thus, a father and mother frequently join to appoint property in which both have joint or successive interests, in trust for their children. Here both father and mother are settlors—at least when the power of appointment is a general power, and they are entitled to the property in default of appointment; if they appoint under a mere special power to appoint among their children, then the creator or donor of the power, and not they, will be the settlor. Again, there is seldom only one trustee, at any rate in the case of express trusts, which, as we shall shortly see, are by far the largest class of trusts arising out of actual confidence. It is usual to appoint at least two or three persons joint trustees, and to vest the trust property in them as joint tenants. And, in the same way, it is rarely that a trust is constituted for the benefit of a single person. Most trusts are either for the benefit of all the members of a family, or for the benefit of the public generally, or of a particular section of it.

On the other hand, the same person may be, and frequently is, both settlor and *cestui que trust*. When a man on his marriage settles his property, he usually reserves to himself a life interest in it, with an ultimate remainder absolutely, in case there are no children of the marriage. Here he is both settlor and *cestui que trust*. And, as we shall see, sometimes a settlor, instead of conveying the trust property to a trustee, declares himself a

trustee of it for the benefit of the *cestuis que trustent*. Here one person is at once both settlor and trustee. And sometimes a person conveys his own property to himself and other trustees in trust for himself for life and afterwards for others—his wife and children generally. Here the same person is at the same time settlor, trustee, and one of the *cestuis que trustent*. But it is to be noted, that no person can be sole trustee for himself *only*. Once he has vested in him both the nominal and beneficial interests, he is the owner of the whole property; however the instrument conveying the property to him may describe him. Thus, to adopt the last example given as an illustration, if A. declares himself trustee of his property for himself for life, then for his wife for life, and then for the children of the marriage equally in case there are any children, but in case there are no children for himself absolutely, then, should A.'s wife die during A.'s lifetime without having had any children, A. would not then be trustee of the trust property for himself, but absolute owner in law and equity.

*Kinds of trusts.*—Trusts may be classified, either according to the duties of the trustees, or according to the nature of the *cestuis que trustent*, or according to the mode in which they were created.

Classified according to the duties of trustees, trusts are either *simple* or *special*. A simple trust, perhaps more frequently called a 'bare' trust, is one where no specific duties in respect to the trust property are imposed by the instrument; but these are left to be defined by the law. Here all that the trustee has to do is to allow the *cestui que trust* for the time being to enjoy the profits of the trust property, and, if the *cestui que trust* is the sole *cestui que trust* and of full age and capacity, to convey the trust property as he (the *cestui que trust*) may direct. A special trust is one where specific duties, in regard to the trust property, are imposed on the trustee by the instrument creating the trust. This distinction between active or special, and



passive or simple trusts, is of little importance as far as trusts themselves are concerned ; since the law as to passive trusts is also the law as to active trusts, save in so far as it is altered by the particular instrument creating a particular active trust. But sometimes the distinction is important as determining whether there is a trust at all. The Statute of Uses (*a*) applies only to simple uses or trusts of freehold land ; and accordingly what on the face of it purports to be a trust of lands may or may not be so, according as the trustee to uses has, or has not, active duties imposed upon him. And in the case of trusts constituted by will, the distinction may be of importance in determining the extent of the estate taken by the trustees (*b*).

Classified according to the nature of their *cestuis que trustent*, trusts are either *private* or *charitable*. Shortly, the difference between a private and a charitable trust is this : the former is for the benefit of particular individuals, the latter is for the benefit of persons, not as individuals, but as members of the public, or not for persons at all, but for public institutions (*c*) of a charitable nature. All public purposes are not charitable purposes. Thus, it has been recently held, that a trust for the advancement of yacht racing (*d*), and a trust for the purchase of advowsons (*e*), are not charitable trusts. Generally speaking, a public purpose, to be charitable, must come within the objects described as charitable in the Charitable Trust Act, 1601 ; and, if it comes within such objects, it does not matter whether the persons or institutions to be benefited are in England or abroad (*f*). But the question of what exactly constitutes a charitable trust is at present very open (*g*).

(*a*) 27 Hen. 8 (1535) c. 10.  
(See *ante*, vol. i., pp. 247–251.)

(*b*) See *Van Grutten v. Foxwell*  
[1897] A. C. 658.

(*c*) *Re Mann* [1903] 1 Ch. 232.

(*d*) *Re Nottage* (No. 1) [1895]  
2 Ch. 649.

(*e*) *Hunter v. A.-G. and Hood*  
[1899] A. C. 309.

(*f*) *Re Geck* [1893] W. N. 161 ;  
69 L. T. 819.

(*g*) See *Income Tax Commis-  
sioners v. Pemsel* [1891] A. C.  
531 ; *Re Pardoe* [1906] 2 Ch.

Classified according to the mode in which they are created, trusts are either *express* or *implied*. An express trust is one which arises because the settlor constitutes it by declaring his intention to that effect in words or by conduct. An implied trust is one which the settlor does not expressly constitute, but which the court, from the surrounding circumstances, presumes he intended should be created. Implied trusts are usually divided into two classes, *resulting* and *constructive* (a). A resulting trust is one where, though the settlor has vested property in another person without any suggestion of that person being a trustee for him, yet the court presumes such was his intention. 'Constructive trust' is generally used as descriptive of the relationship between the legal owner and the equitable owner, whenever the legal and equitable interests have become separated without any intention on the part of any one to create a trust (b). Here, however, we are discussing trusts which arise out of actual confidence or undertaking. We will, therefore, for present purposes, confine ourselves to trusts which, though it was not the intention of the parties to create them, arise by construction of law, owing to a fiduciary relationship having existed between the parties.

We propose to use this last classification as the basis for the arrangement of what we have to say as to trusts. When the law is modified according as the trust is simple or special, private or charitable (c), we will point out the modification in passing.

184; *Murdoch's Trustees v. Weir* [1907] S. C. 185. Possibly the word has different meanings for different purposes.

(a) The terms here used are not to be taken as in any way fixed. Every writer on Trusts appears to choose his own. Mr. Underhill divides Trusts generally into 'declared' and 'constructive,' and constructive trusts into resulting trusts and 'con-

structive trusts which are not 'resulting.' The important point to remember is: that the first class is founded on express intention, the second on presumed intention, and the last not on intention at all.

(b) See *per* Lord LINDLEY, *Hardoon v. Belilios* [1901] A. C., at p. 123.

(c) For a succinct statement of the differences between private

## EXPRESS TRUSTS.

*Constituting express trusts.*—An express trust can be completely constituted (1) by the settlor transferring by regular assurance the intended trust property to trustees, who, by their acceptance of it, undertake to hold it on the trusts declared by him, or (2) by the settlor himself retaining the property, and, by express declaration or by conduct, undertaking to hold it on the trusts he declares (a).

As an example of the conduct, which, without any express declaration, would constitute a person trustee of money under his control, we may note that, if a person receives money on account of another, and pays it into his own bank, but to a separate account, he constitutes himself a trustee of such money (b), and is no longer a mere debtor to the person for whom he has received it.

Whatever mode is followed, no trust will be held to be constituted, unless the language used or the conduct of the parties makes three points certain.

In the first place, it must make certain that it was intended to constitute a trust. The tendency of the courts at one time was to treat every expression of a donor, or more especially a testator, of his wishes as to what the donee or legatee should do with the property given or bequeathed, as establishing what was called a 'precatory trust' binding the donee or legatee's conscience. This tendency now has been reversed. It is for him who alleges a trust to prove it; and the court will not turn a donee into a trustee, unless it is clear that such was the intention of the donor (c).

and charitable trusts, see Strahan and Kenrick, *Digest of Equity*, pp. 185–198.

(a) *Per* JESSEL, M.R., in *Richards v. Delbridge* (1874) L. R. 18 Eq., at p. 14.

(b) *Per* Lord SELBORNE, in

*Lyell v. Kennedy* (1889) L. R. 14 App. Ca., at p. 457.

(c) *Re Adams and the Kensington Vestry* (1884) 27 Ch. D. 394; *Hill v. Hill* [1897] 1 Q. B. 483; *Re Williams* [1897] 2 Ch. 12; *Comiskey v. Bowring-Hanbury*

In the second place, to constitute a trust, it must be certain to what property the trust is to attach. Not infrequently, testators give property to a legatee, and then attempt to declare a trust of what remains of such property on the legatee's death. Here the trust will fail; for no definite part of the legacy is subjected to the trust (a).

In the third place, the *cestuis que trustent* must be certain. If it is not clear whom the settlor intended to benefit, then the trust fails. But where the trust is a charitable one, uncertainty as to the exact persons or institution, to be benefited, will not invalidate the trust, provided the settlor has shown a general intention of charity (b); that is, an intention that the money given shall be used for charitable purposes, whether the precise objects he himself prescribes can be carried out or not. When the trust money is applied to other than the precise objects stated by the settlor, the trust is said to be carried out *cy près*.

If these three points—called the 'three certainties'—are made clear, no formal language is necessary to the declaration of a trust. Nor were any other formalities required originally. A trust was, as the phrase is, *averrable*—that is, could be declared by parol; and the declaration could be proved by any evidence which would establish any other fact. This has now been to a great extent altered by statute.

In the first place, by the Statute of Frauds (c), it is enacted, that all declarations or creations of trusts or confidences of lands, tenements, or hereditaments, shall be proved by some writing signed by the party who is by

[1905] A. C. 84; *Re Atkinson* (1911) 80 L. J. Ch., at p. 372; *Re Conolly* [1910] 1 Ch. 219.

(a) *Re Richards* [1902] 1 Ch. 76. The trust is also repugnant to the absolute gift of the property. (See Underhill and Strahan, *Inter. of Wills*, pp. 175–178.) Perhaps a better instance

of uncertainty as to property occurs where property is left to objects which may or may not be charitable, and no appropriation of it among them is made (*Re Sidney* [1908] 1 Ch. 488).

(b) *Re Davis* [1902] 1 Ch. 876; *Blair v. Duncan* [1902] A. C. 37.

(c) 29 Car. 2 (1677) c. 3, s. 7.

law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of none effect.

Four points in this enactment may be noted as regards trusts declared *inter vivos*. First, it applies only to trusts of lands (which includes leaseholds), tenements, and hereditaments ; accordingly trusts of pure personalty may still be validly created by word of mouth (a). Second, the declaration need not be made, but only proved, by writing. Accordingly, the writing will be sufficient, although it was made long after the trust was declared (b). Third, a writing only, and not a deed, is necessary. And, lastly, the writing is to be signed by the party who is by law enabled to declare the trust. This, as we have seen, is the beneficial owner of the property to be made subject to the trust.

In the second place, as to trusts declared by will, the enactment contained in the Statute of Frauds has now been superseded by the requirements of the Wills Act, 1837. It may be taken that, under the latter statute, no equitable, any more than the legal, interest or estate in property of any kind, can be disposed of after death, by any direction by word of mouth, or in writing, other than one contained in a will executed in accordance with that statute (c).

As regards, however, both the Statute of Frauds, 1677, and the Wills Act, 1837, the object of those statutes is to prevent, not to protect, fraud. Accordingly, if a person obtains possession of property in the character of trustee, he will not be allowed to keep it on the ground that the trusts, not having been declared in writing, cannot be proved within the statute (d). Nor, in the same way, will an heir who induced his ancestor to make no will,

(a) *M'Fadden v. Jenkins* (1842) 531 ; *Re Hetley* [1902] 2 Ch. 866 ; 1 Ph. 153. *Re Huxtable* [1902] 2 Ch. 793.

(b) *Gardner v. Rowe* (1828) 5 Russ. 258. (d) *Rochevoucauld v. Boustead* [1897] 1 Ch. 196.

(c) *Re Boyes* (1884) 26 Ch. D.

by promising to use the land descendible to him in a certain way, or the legatee who undertook that if a legacy were left to him he would hold it on trust for a certain purpose, be permitted to take advantage of his fraud (a).

*Completely constituted trust.*—An express trust is fully constituted when the property affected by the trust is either vested in trustees for the benefit of the *cestuis que trustent*, or the owner of it declares himself a trustee for their benefit. In either case the declaration of trust amounts to a conveyance in equity. It follows that the trust may be enforced by the *cestuis que trustent*, though they may not have been parties to the trust agreement, or even born when it was entered into. In many ways the rights arising under a declaration of trust are very similar to contractual rights; but on this point they are absolutely different. This is the characteristic difference between a trust and a real contract—in the sense in which that term is used in civil law. Bailment is, for instance, a real contract, and one very closely resembling a trust; but it can only be enforced by parties to it. A trust fully constituted can be enforced by any one taking an interest in the trust property under the declaration of trust (b).

*Incompletely constituted trusts.*—It is to be noted, however, that this doctrine, that the constitution of trust is a conveyance, applies only when the trust is completely constituted. As long as it remains incomplete, or a 'trust *in fieri*,' as it is sometimes called, equity will not regard it as a grant, unless it is also based on valuable consideration. Thus, if A. has merely promised to declare a trust in favour of B., then, unless B. has given A. consideration for the promise, B. will take no interest in equity any more than in law, until A. has actually declared the trust.

(a) See *Re Stead* [1900] 1 Ch. pp. 52 *et seq.*, and Strahan and Kenrick, *Digest of Equity*, pp. 237. The rule affecting wills is stated here very compendiously, and must not be taken as exhaustive. (See Underhill, *Trusts*, 60-62.)

(b) See ante, p. 382.

And if A. has intended, not to declare a trust, but to make a gift of a horse to B., and such gift is ineffectual in law for some reason or other—such as not being completed by delivery of the horse (a)—equity will not aid B. to obtain the horse, by turning A.'s words of gift into a declaration of trust in B.'s favour. The rule is: that equity will not aid a volunteer, by construing a gift to operate in a way different from that intended (b).

Difficult questions, as to whether a trust was completely constituted or not, used formerly to arise when a settlor purported to assign to trustees property which at law was not assignable. Of late, however, owing to legislation which has made nearly everything which can be called property assignable at law, the difficulties now arise chiefly where there has been no attempt to assign, but only an agreement to settle. This occurs frequently in connection with marriage articles—that is, agreements to create trusts made in consideration of intended marriages. Now marriage, in equity, constitutes a valuable consideration; and so such an agreement is enforceable in equity, and, when constituted, the trust is not a voluntary trust, but a trust for value.

The difficulties which arise under marriage articles, then, are not that they are not based on value, but that an agreement to create a trust, like any other contract, can be enforced only by a person who is not merely a party to the agreement, but a party also to the consideration. The question, then, is: who is a party to, or as the phrase is, who is 'within the marriage consideration'? It has now been decided that, besides the husband and wife, the issue of the marriage, and the trustees whose duty it is to protect their interests, are within it (c). But all others taking benefits under the articles are, so

(a) *Cochrane v. Moore* (1890) 25 Q. B. D. 57. *Re Ellenborough* [1903] 1 Ch. 697.

(b) *Milroy v. Lord* (1862) 4 De G. F. & J. 264. And see (c) *Re Plumptre's Marriage Settlement* [1910] 1 Ch. 609; and see *Pullan v. Koe* [1913] 1 Ch. 9.

far as the marriage consideration is concerned, *volunteers*; that is, they give no consideration (a). Of course, if the trust money was provided by persons other than the intended husband and wife—such as their parents—they (the parents) will have given consideration other than marriage, for any interests taken by them under the articles. The result is: that if the intended settlement is duly constituted, and the trust property transferred to the trustees, volunteers under it will be entitled to the interests reserved to them, just as much as if they had given value. But if it is never duly constituted—and volunteers will have no right to have it duly constituted—those giving value may, if all are of full age and capacity, join to cancel the articles, though the result may be to defeat the interests of the volunteers under it. Thus, suppose A. by articles agrees to settle 10,000*l.* for the benefit of his intended wife for life, then of her children by the marriage and also of her children by a previous marriage. In this case, if no actual settlement is made, and the wife predeceases A., there is nothing to prevent A. and the children by the second marriage (who are purchasers for value), joining to annul the marriage articles, and so depriving the wife's children by her first marriage—who are volunteers—of the provision intended for them.

Incompletely constituted trusts, even when supported by a marriage consideration, are, by the Bankruptcy Act, 1883 (b), as modified by the Bankruptcy Act, 1913 (c), made liable to fail. The effect of these such enactments has been fully stated in a previous portion of this work (d).

In what we have above said, we have been speaking of trusts incompletely constituted *inter vivos*. In the case of a trust created by will, what has been said has no application; for the reason that a will is, both in law and equity, a conveyance. Accordingly, every trust arising under a

(a) *De Mestre v. West* [1891]  
A. C. 264; *A.-G. v. Jacobs-Smith* [1895] 2 Q. B. 341.

(b) S. 47.

(c) S. 13.

(d) See *ante*, vol. ii., pp. 284–285,



will is, from the death of the testator, a completely constituted trust ; and no question of consideration or being party to a consideration can arise.

*Voluntary trusts.*—Voluntary trusts, whether completely constituted or not, are subject to further serious disadvantages as compared with trusts for value. These consist now of their liability to be set aside as against the settlor's trustee in bankruptcy or the settlor's creditors.

The first of these disadvantages is imposed by the Bankruptcy Act, 1883, previously referred to in detail (a). By that Act it is declared that a voluntary settlement shall be absolutely void (a) if made within two years before the settlor's bankruptcy or liquidation, and (b) if made more than two years, but within ten years before such bankruptcy or liquidation, shall be void unless it can be shown that the settlor was solvent at the date of the settlement, without the aid of the property comprised in the settlement, and that the settlor's interest in such property passed to the trustees of the settlement on the execution thereof.

An exception is made in respect of property which has accrued to the settlor since marriage in right of his wife, and of a policy of insurance for the benefit of his wife and children, under the Married Women's Property Act, 1882 (b).

The second disadvantage is imposed by 13 Eliz. (1571) c. 5. That statute enacts, that a disposition of realty, or any personalty which might be taken in execution (c), made by a settlor with the intent of delaying or defeating his creditors, is to be void as against such creditors. This general enactment is, however, practically restricted to voluntary settlements by another of its provisions (d), which enacts, that where the settlement is made for value, it is not to be void unless the person giving value was a

(a) S. 47. (See *ante*, vol. ii., pp. 283–284.)

(b) S. 11.

(c) *Rider v. Kidder* (1805) 10 Ves. 360.

(d) S. 5.

party to the settlor's fraud ; and so, even a voluntary settlement will be valid, where a subsequent purchaser, without notice of any fraud, has given value for the interests created under it.

In order to show that a settlement was made with the object of delaying or defeating creditors, it is not necessary to prove an actual intention to this effect on the part of the settlor. Such intention will be presumed, if it is shown that it was made by the settlor under circumstances naturally calculated to have this result as to his then or future creditors, and that it in fact has had that result (a). Thus, a voluntary settlement made by a settlor just before entering into a hazardous enterprise, will sufficiently indicate such an intention (b). So will a voluntary settlement made at a time when he expected judgment in a then pending action to be given against him (c). The fact that, in a voluntary settlement, the life interest reserved to the settlor is made determinable on his bankruptcy, is also a circumstance strongly indicating that the settlement was intended for the purpose of defeating creditors. Indeed, at one time such a condition was held to be conclusive on the question (d) ; but that view can be considered good law no longer. The rule now is : that " in each case you must look at the " whole of the circumstances surrounding the execution of " the conveyance, and then ask yourself the question " whether the conveyance was in fact executed with the " intent to defeat or delay creditors " (e).

Lastly, voluntary settlements of lands might under 27 Eliz. (1584) c. 4 have been defeated by the subsequent sale by the settlor of the settled lands to a purchaser for value. We need not, however, discuss this enactment

(a) *Freeman v. Pope* (1870) L. R. 5 Ch., at p. 543.

(b) *Mackay v. Douglas* (1872) L. R. 14 Eq. 106.

(c) *Reese River Company v. Attwell* (1869) L. R. 7 Eq. 347.

(d) *Re Pearson* (1876) 3 Ch. D. 807.

(e) *Re Holland* [1902] 2 Ch., at p. 372, per VAUGHAN WILLIAMS, L.J.

now ; since, by the Voluntary Conveyances Act, 1893, it is enacted, that no voluntary settlement, whether made before or after the passing of the Act, if made *bonâ fide*, shall henceforth be deemed fraudulent within the meaning of 27 Eliz. c. 4, by reason of any subsequent purchase for value, or be defeated under any of the provisions of that Act by a conveyance made upon any such purchase.

*Incompletely expressed trusts.*—An incompletely constituted trust must be clearly distinguished from an incompletely expressed trust. A completely expressed—or *executed*—trust, is a trust wherein the settlor has set out completely the limitations on which the trust property is to be held ; where, in the words of Lord ST. LEONARDS (a), ‘ he has been his own conveyancer.’ Thus, a trust to pay the income of the trust property to A. for life, and, on A.’s death, to hold the corpus for the children of A. in such proportion as A. shall appoint, and in default of such appointment for them in equal shares, would be an executed trust. An incompletely expressed—or *executory*—trust, is a trust wherein the settlor merely gives a general direction as to the limitations on which the trust property is to be held ; where, in the words of Lord CAIRNS (b), the trust is executory in this sense, that “ it “ is to be executed by the preparation of a complete and “ formal settlement carrying into effect, through the operation of an apt and detailed legal phraseology, the general “ intention compendiously indicated by the ” settlor. Thus, a trust that certain freeholds, leaseholds, furniture, plate, etc., should follow the barony of B. as nearly as practicable, and according as the trustees should think proper or counsel should advise, would be an executory trust (c).

Executory trusts frequently occur in marriage articles ;

(a) *Egerton v. Earl Brownlow* at p. 571.  
(1853) 4 H. L. C., at p. 210.

(b) *Sackville-West v. Viscount Holmesdale*, *ubi sup.* ; *Re Johnstone* (1884) 26 Ch. D. 538.

where, as we have seen, the trust created is usually incompletely constituted. But they also frequently occur in wills; where, as we have also seen, the trust created is always completely constituted. It is to be remembered, then, that the fact that a trust is executory does not in any way decide whether it is merely in essence a contract to create, or an actual conveyance of, the interests arising under it.

The importance of the distinction between executed and executory trusts depends on the different rules of interpretation applicable to them severally. Save that technical words are not absolutely necessary to convey an estate in fee simple or in tail in the equitable interest arising under it (a), an executed trust is construed by the court almost as strictly as if it were a limitation of the legal estate (b). Thus, the Rule in *Shelley's Case* will apply to an executed trust, where the technical expressions are used, just as it would apply to a direct limitation (c). On the other hand, executory trusts are construed liberally (d); and, where it is clear that the settlor had a different intention, the court will not defeat such intention by applying any technical rule, or by giving a technical meaning to technical words (e). Further, where the executory trusts arise under marriage articles, the court will presume, till the contrary is shown, that the intention of the parties was to provide for the issue of the marriage; and will not so interpret the trusts as to defeat this object. Thus, on marriage articles directing the settlement of freehold land in trust for the husband for life, and then for the husband's heirs male by the wife, the court will hold that it was intended to give the husband

(a) *Re Oliver's Settlement* [1905] 1 Ch. 191.

(b) *Re Whiston's Settlement* [1894] 1 Ch. 661.

(c) *Jervoise v. Dulce of Northumberland* (1820) 1 J. & W. 559; *Re Simcoe* [1913] 1 Ch. 553.

(d) *Papillon v. Voice* (1728) 2 P. Wms. 471.

(e) *Lord Glenorchy v. Bosville* (1733) 2 W. & T., L. C. 763; *Blackburn v. Stables* (1814) 2 V. & B. 367.

a life estate with remainder in tail to his sons by his then wife ; and not to give him an estate tail, which might enable him to appropriate the whole estate to his own benefit by barring the entail (a).

In the same way, while a limitation in an executed trust which is contrary to the Rule of Perpetuities, or otherwise illegal, fails, a direction in an executory trust to settle in a way that would break such rule, or be otherwise illegal, will, if possible, be so adapted as to make the limitation good (b).

### IMPLIED TRUSTS.

Implied trusts, as we have seen, are divided into two classes : (1) resulting trusts, where, though there is no expression by word or conduct that a trust in the settlor's favour was intended, yet the court presumes that the settlor intended to create such a trust ; (2) constructive trusts, where, independently of any intention to create a trust, the court holds that a trust exists. We will discuss shortly each of these.

(1) *Resulting trusts*.—Resulting trusts may arise (a) where no express trust of any kind is created, but property is transferred to a person who gives no value for it ; (b) where an express trust is duly constituted, but the trusts are not declared, or those declared are not binding on the settlor, or do not exhaust the whole beneficial interest in the trust property. In either of these cases, the court may on principle, or on the surrounding circumstances, hold that a trust of the beneficial interest, or of the residue of it, was intended in favour of the person providing the trust property ; until the contrary is shown. These are called resulting trusts ; because the beneficial interest results back to the person who provided or paid for the trust property.

(a) *Trevor v. Trevor* (1719) 1 (1716) 1 P. Wms. 332 ; *Re Russell* [1895] 2 Ch. 698.  
P. Wms. 622.

(b) *Humberston v. Humberston*

(a) Resulting trusts of the first kind may arise where one person pays the purchase money for property which is transferred, not to him, but to another person, or where the owner of property transfers it to another person who gives him no consideration for it.

No consideration is necessary to support a legal conveyance of the legal estate, or an equitable conveyance of the equitable estate. Yet there is an equitable rule which requires under certain circumstances a valuable consideration in the case of either a legal or equitable conveyance ; in order to rebut a trust which the person providing or paying for the property is presumed to have intended to create, but which he was too stupid or too negligent to mention. This doctrine prevails, too, in spite of the modern rule, that where any one alleges that a person who on the face of the assignment is a donee, is really a trustee, it lies on him to prove the trust (a).

This doctrine would probably never have been invented but for two practices, now long obsolete, which made it originally reasonable. The first was the practice of feoffments to uses, especially to the uses of the feoffor's will (b). Very often the uses were declared orally ; and, once the feoffor was dead, if the feoffee denied the uses, it often must have been nearly impossible to prove them. To prevent frauds, therefore, it was necessary for the Court of Chancery to hold that, where a feoffee gave no value, he must be considered, *prima facie*, a feoffee to the use of the feoffor. This argument ceased to have any practical value after the passing of the Statute of Wills in 1540, as was recognised by the legislature in the Statute of Frauds, 1677. The second practice was the system of conveying freeholds to the purchaser and another as joint tenants, for the purpose of barring the purchaser's wife's right to dower. Where the court found that property was conveyed to the purchaser and another, or to others than

(a) See *ante*, p. 387.

(b) See *ante*, vol. i., p. 455.

the purchaser, it was natural enough in view of this practice, to hold, where the stranger or strangers were not expressly declared to be trustee or trustees for the purchaser, that this was merely due to an oversight, and that the real object of the purchaser in having the property thus conveyed was to bar dower. When the reason of the rule was forgotten, the rule was extended to purchases generally, and based on some other consideration which, it is submitted, is neither very clear nor very reasonable.

The rules with regard to resulting trusts of the first kind may be shortly stated thus. Where one person as purchaser pays for property, which, at his request, is transferred to him jointly with another or others, or to another or others jointly, this other or these others are presumed to be a trustee or trustees of the interests he or they take, for the person paying the purchase money. This principle is mitigated by two sub-rules. The first is that, as such presumption amounts to holding that the person paying the purchase money did not mean what his instruments and acts say he meant, parol evidence of the settlor's declarations *before*, and of the persons taking the property *before and after* the conveyance, may be given to show that he actually did mean what these say. The second is that, where the person paying the purchase money is the husband of the other person, or the father of the other person or persons, or *in loco parentis* to the other person or persons, or the other person or persons were trustees of a settlement by which the person paying the purchase money has settled property in favour of somebody else (a)—then the presumption that he intended only to benefit himself when he bought property for some one else is rebutted (b). But parol evidence will

(a) *Re Curteis' Trusts* (1872) L. R. 14 Eq. 217.

(b) *Standing v. Bowring* (1885) 31 Ch. D. 282. It seems that there is no presumption that a

purchase by a wife in the name of her husband is intended as a gift to him. (*Mercier v. Mercier* [1903] 2 Ch. 98.)

again be admitted to show that he did not really mean what his instruments and acts show he meant ; according to the general rule that external evidence may be given to rebut, though not to raise, an artificial presumption of law in the construction of a written document. It seems, however, to be the better opinion, that no presumption of a resulting trust arises on a voluntary conveyance of land, even though made in favour of a stranger to the donor ; unless it was obviously made for the benefit of the donor (*a*).

(*b*) Resulting trusts of the second kind arise, as has been already said, only where an express trust has been duly constituted, and the purposes for which it was constituted have wholly or partially failed. They consist of three classes.

The first class—where the trust is constituted, but the trusts are not declared—needs little illustration. Where the instrument transferring the property clearly states that the transferee takes as trustee, but fails to declare the trusts, of course the trustee cannot benefit by the transfer. In the absence of evidence to show what the trusts were—and parol evidence cannot be admitted where (1) the property is land, or (2) the trust is created by will, unless where the admission of such evidence is necessary to prevent a fraud—there is a resulting trust in favour of the settlor or his representatives (*b*).

The second class arises where the trusts declared are not binding on the settlor. This class is itself divisible into two sub-classes. The first is where the trusts are intentionally created for an unlawful purpose. There they are not binding on the settlor ; and he can reclaim the property, if he intervenes before the unlawful purpose is carried out, or if the court thinks that the public

(*a*) *Lloyd v. Spillet* (1740) 2 Atk. 148 ; *Young v. Peachy* (1741) 2 Atk. 257 ; *Fowkes v. Pascoc* (1875) L. R. 10 Ch. 343.

(*b*) *Barrs v. Fewkes* (1864) 2 H. & M. 60 ; *Longley v. Longley* (1871) L. R. 13 Eq. 133.



purposes are best served by restoring the property to the settlor. Otherwise, though the trusts are void, the rule is : *in pari delicto, potior est conditio possidentis* ; and the trustee will be entitled to keep the property discharged of the trusts.

The second sub-class arises where the trusts are impossible, or contrary to some technical rule of law, or are, in fact, for the settlor's own convenience. The commonest example of impossible trusts is where the object for which the trust was created has ceased to exist ; as where a marriage settlement is executed, but no marriage ever takes place. The commonest example of trusts contrary to a technical rule of law is a trust contrary to the Rule against Perpetuities. It may be noticed, however, that the Rule against Perpetuities has only a modified application to a trust in favour of a charity. A condition may be attached to such a trust for ever ; provided that the limitation over on breach of the condition is not to an individual, but to another charity (a). The commonest example of a trust which, while nominally for the benefit of others, is yet really for the settlor's own convenience, is the case of a trust for the payment of the settlor's debts. Such a trust may be revoked by the settlor at any time before the creditors become actual parties to it (b), or give value by delaying the claims for their debts in reliance upon it (c). When either of these events takes place, the trust becomes binding on the settlor, as far as those so becoming parties or giving value are concerned.

The last class occurs where the settlor has declared trusts which do not exhaust the whole income, or (as the

(a) *Christ's Hospital v. Granger* (1849) 1 Mac. & G. 460 ; *Re Bowen* [1893] 2 Ch. 491. But it should be carefully remembered that a limitation which does not vest the property in any charity until after the period of perpetuity, is bad *ab initio*.  
(b) *Cosser v. Radford* (1863) 1 De G. J. & S. 585.  
(c) *Garrard v. Lord Lauderdale* (1830) 3 Sim. 1 ; *Johns v. James* (1878) 8 Ch. D. 744.

case may be) the whole *corpus* of the trust property. Here two questions may arise. The first is, whether the gift is entirely on trust, or whether it is only a gift to the so-called trustee, subject to the performance of the trust. If it is the first, then, if the trust does not exhaust the beneficial interest in the trust property, there is a resulting trust of the residue; but if it is the second, the residue after the performance of the trust belongs to the trustee (a). The second question that sometimes arises is, whether the trust property is disposed of only in so far as is necessary to perform the trusts declared, or whether it is disposed of altogether in favour of the *cestuis que trustent*. Again, if it is the former, there is a resulting trust of any residue; but if the latter, the *cestuis que trustent* take the whole property. An example will show the distinction. As a rule, where a debtor assigns his property to trustees for the payment of his debts, then, after all the debts are paid, there is a resulting trust to him of any residue. But where the assignment is not merely for the payment of his debts, but is to “pay and divide” the trust property among his creditors, “in rateable proportions, according to the amount of their several and respective debts,” this is an absolute assignment for the benefit of the creditors; and the whole trust property is divisible among them (b).

(2) *Constructive trusts*.—Constructive trusts, as we have already said, are usually held to include all cases where the legal and equitable ownership of property becomes vested in different persons. Here, however, we will confine the term to trusts which arise by construction of law, owing to a fiduciary relationship having existed between the parties.

Taken in this sense, a constructive trust is not so much an actual trust, as the relationship which arises

(a) See *Cunnack v. Edwards* 297; *Cunnack v. Edwards*, *ubi sup.*  
[1896] 2 Ch. 679.

(b) *Smith v. Cooke* [1891] A. C.

upon the breach of an actual trust or confidence. Thus, the trustee of leaseholds who renews the lease for his own benefit, a trustee of any property who makes improperly any profit out of his administration of it, a confidential agent who accepts a bribe, a doctor or solicitor who takes advantage of his position to obtain a gift from his patient or client—are each respectively a constructive trustee of what he has received (*a*). In all these cases, the constructive trust arises, not out of actual confidence reposed as to the property received, but out of the breach of the general confidential or fiduciary relationship between the parties.

One primary distinction between constructive trusts of this kind and constructive trusts imposed by law, where no fiduciary relationship subsists, is, that in constructive trusts arising out of fiduciary relationships, as in express and resulting trusts, time is, in equity, sometimes no defence to an action for the recovery of the property subject to the trust (*b*). In the case of constructive trusts, where no fiduciary relationship subsists, the constructive trustee can always rely on lapse of time.

## PART II.—ADMINISTRATION OF TRUSTS.

*Office of trustee.*—Trustees are, in the first instance, almost invariably appointed by the settlor. When the trust is created *inter vivos*, they show their acceptance of the trust by becoming parties to the instrument creating it. When it is created by will, they are entitled to accept or disclaim the trust as they please. A married woman can only disclaim by deed (*c*). But a man (or *feme sole*) may disclaim by any writing or conduct which shows that he does not intend to accept the trust; in which case, though the trust property is bequeathed to him,

(*a*) See *Re Biss* [1903] 2 Ch. 40.

(*c*) Real Property Act, 1845,

(*b*) See *post*, pp. 424–425.

s. 7.

no interest in it will vest in him (a). If all the persons nominated by the settlor as trustees disclaim, the court will nevertheless see that the trust is administered by appointing other trustees; it being a maxim of equity that the court will not allow a trust to fail for want of a trustee. In the same way, a trust may be accepted by the trustee, either expressly, or implicitly, by acting as trustee. If a trustee accepts any part of the trust, he accepts it all (b).

Once a person has accepted the trust, he is not entitled to retire when he pleases; unless the trust instrument gives him an express authority to do so. Usually this authority takes the form of a power vested in the tenant for life of the trust property, or some other person, to appoint new trustees in place of any of the original trustees who desire to retire. But, whether there is any such power contained in the trust instrument or not, if there are more than two trustees, and there is nothing in the trust instrument to the contrary, one trustee may now, with the consent of his co-trustees, and of the person entitled to appoint new trustees (if there is any such person), retire from the trust (c). A trustee may also be discharged from the trust by the consent of all the *cestuis que trustent*; provided these are of full age and sound mind. In default of any of these methods, the trustee may obtain an order from the court discharging him, and appointing another trustee, or others, in his place.

Besides the statutory power referred to above, new statutory powers to remove trustees and appoint others in their places have been conferred by the Trustee Act, 1893, which codifies a large part of the law relating to trustees. By the first of these enactments, where a trustee, either original or substituted, and whether appointed by the court or otherwise, is dead, or remains

(a) *Re Birchall* (1889) 40 Ch. [1896] 1 Ch. 228.

D. 436.

(c) Trustee Act, 1893, s. 11.

(b) *Re Lord and Fullerton*

out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act, or is incapable of acting therein, then the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or, if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representative of the last surviving or continuing trustee (which includes a sole (a) and a last retiring trustee) may, by writing, appoint another person or other persons to be trustee or trustees in the place of the trustee dead (b), remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit, or being incapable as aforesaid (c). Large powers are given, on making such appointment, to vary the number of trustees, and to appoint separate sets of trustees for separate parts of the trust property. Any assurance necessary to vest the trust property in the new trustees is to be executed on such appointment; and the new trustees, both before and after the property is so vested, are to have the same powers, authorities, and discretions as the original trustees. And now, by the Conveyancing Act, 1911 (d), these powers, authorities, and discretions are to vest in the personal representatives of the last surviving trustee until new trustees are appointed. Both of these sections apply only in so far as they are not excluded by the instrument creating the trust.

By another section of the Trustee Act, 1893 (e), the Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient,

(a) *Re Shafte* (1885) 29 Ch. D. 247.

(b) This provision seems to imply a power to remove the absent, unwilling, or incapable trustee. But there is no express

power to that effect in the section.—E. J.

(c) Trustee Act, 1893, s. 10.

(d) S. 8.

(e) S. 25.

difficult, or impracticable so to do without the assistance of the court, make an order for the appointment of a new trustee or new trustees, either in substitution for, or in addition to any existing trustee or trustees, or although there is no existing trustee. And the court, in making an order to appoint new trustees, or in cases where it is difficult or impossible to secure a conveyance of land or a transfer of securities held in trust, may make an order vesting the land or securities in the new trustees (*a*). The new trustees appointed by the court are to have the same powers, authorities, and discretions, as the original trustees (*b*).

Trustees are invariably made joint tenants of the trust property; and, accordingly, on the death of one, the whole trust property remains in the survivors. The powers and discretions also remain in the survivors; unless an intention is expressed to the contrary in the trust instrument. On the death of a sole or last surviving trustee, the trust property, notwithstanding any attempted devise, devolves, since December 31st, 1881, on his legal personal representative (*c*) (who, as we have seen, has power to appoint new trustees); except where the trust property is a legal estate of copyhold (*d*), when the old law applies, and the copyhold devolves, either on the trustee's customary heir, or on his devisee. It is submitted that by 'legal personal representative' is meant, the executor or administrator who is appointed to administer the trustee's personalty in the country or district where the trust property—whether it is land or goods—is situate (*e*).

A trustee receives no remuneration for his trouble in administering the trust; unless the trust instrument

(*a*) Trustee Act, 1893, ss. 26–35.

(*b*) *Ibid.* s. 37.

(*c*) Conveyancing Act, 1881, s. 30.

(*d*) Copyhold Act, 1894, s. 88.

(*e*) See *Re Cohen's Executors and London County Council* [1902] 1 Ch. 187. (But cf. *Re Parker's Trusts* [1894] 1 Ch. 707.)

expressly provides to the contrary. Provision has, however, been lately made by statute (a) for the appointment by the court, on the application of either an existing trustee or a *cestui que trust*, of a 'judicial trustee,' either jointly with the existing trustee or as sole trustee, or in place of all or any trustees; and he may be remunerated. A judicial trustee is an officer of the court, and must each year submit his accounts to the court. And, by still more recent legislation, a 'Public Trustee' has been created, who may be appointed to act as a judicial trustee, not only by the court, but by the settlor or the person having the power to appoint new trustees, or to act as a 'custodian trustee' or as an ordinary trustee. A custodian trustee has the custody of title deeds and securities; but does not interfere in the discretionary administration of the trust which continues in the ordinary trustees, who, in each case, are called the 'managing trustees.' He cannot, therefore, be appointed as a sole trustee. But the Public Trustee may be appointed as sole ordinary trustee (b). The fact that a trustee receives remuneration does not increase his liability, or alter his duties as trustee (c); though it has been suggested, that his acceptance of remuneration may be considered as constituting an implied undertaking on his part, that he has competent knowledge and skill in discharging the business of the trust (d).

Any person (including a body corporate) (e) competent to hold property may be made a trustee. But the court will not appoint a person who is not of full age and capacity, nor, as a rule, one who is out of the jurisdiction, or is of bad character. A married woman may now be

(a) Judicial Trustees Act, 1896, s. 1.

(b) Public Trustee Act, 1906, s. 4.

(c) *Jobson v. Palmer* [1893] 1 Ch. 71.

(d) *Speight v. Gaunt* (1883)

L. R. 9 App. Ca., at p. 17, *per* Lord BLACKBURN. And see *National Trustees Co. of Australasia v. General Finance Co.* [1905] A. C. 373.

(e) *Re Thompson's Settlement* [1904] W. N. 205.

appointed as freely as a man (a). The donee of a power except to appoint new trustees should not appoint himself, where circumstances make him the best possible person to appoint (b); and the statutory power conferred by the Trustee Act, 1893 (c), does not entitle a man to appoint himself as trustee (d).

*Estate taken by trustees.*—As has already been said, the question whether a trust is simple or special is sometimes important in determining whether there is any trust at all. If freehold land is limited to trustees on a simple trust, then, unless it is also limited to their use, they take no estate whatever in the land, which, by virtue of (or, in the case of a will, by analogy to) the Statute of Uses, passes through them to the *cestuis que trustent*. This rule, however, does not apply to trusts of the equitable estate, or of leaseholds, or of pure personalty.

Where a special trust of freehold land is created, the extent of the estate taken by the trustees will depend upon whether the trust is created *inter vivos* or by will. If it is created *inter vivos*, they will take, precisely as in the case of any other conveyance, the estate limited to them by the instrument transferring it to them (e). But if it is created by will, the estate which they take will depend upon the proper interpretation of sections 30 and 31 of the Wills Act, 1837—two sections which it is not easy to reconcile (f). The better opinion seems to be, however, that if the beneficial interest is given to a person or persons for life, and the purposes of the trust cannot possibly endure beyond the life of the survivor of such

(a) *Re Dickinson's Trusts* 2 Y. & J. 605.  
[1902] W. N. 104.

(b) *Montefiore v. Guedalla*  
[1903] 2 Ch. 723.

(c) S. 10. (See *ante*, p. 405.)

(d) *Re Sampson* [1906] 1 Ch.  
435.

(e) *Colmore v. Tyndall* (1828)

(f) A scandalous suggestion has been made to the effect that the sections were really intended as alternative suggestions, and that an unlettered legislature adopted both. (See *Freme v. Clement* (1881) 18 Ch. D. 514.)



persons, then the trustees take an estate *pur autre vie* ; in all other cases, whether there are words of limitation or not, they take an estate in fee, or other the whole interest of the testator (a).

*Position of trustee.*—The legal position of a trustee may be summed up shortly under four heads : first, his duties ; second, his powers ; third, his rights ; and fourth, his liabilities. But, before considering these heads separately, it should be pointed out that every power is from another aspect a duty. A duty, in the ordinary sense, means something the trustee is bound to do. If he fails to do it from any cause, he is guilty of a breach of trust. A power only *enables* him to do a certain thing. Yet it is a duty in this respect, that he is bound to exercise reasonable care and judgment in deciding whether he shall do it or not. Negligence in so doing amounts to a failure to discharge this duty, and is a breach of trust. Many duties are coupled with powers ; that is, the trustee is bound to do the thing, but has a power or discretion to decide how or when to do it (b).

*Duties.*—The positive duties of a trustee are thus summed up by LINDLEY, L.J., in *Low v. Bouverie* (c). “ The duty of a trustee is properly to preserve the trust fund, to pay the income and the *corpus* to those who are entitled to them respectively, and to give all his *cestuis que trustent*, on demand, information with respect to the mode in which the trust fund has been dealt with, and where it is.” Taking this as our text, we will examine very shortly what each of these three positive duties involves.

1. *To preserve the trust fund.* In order to preserve the trust fund, the trustee, in the first place, must get in all the outstanding trust property ; and, in the second place, must, if it be personalty, invest it in securities

(a) Jarman, *Wills* (5th edn.), *Digest of Equity*, pp. 107–114.  
vol. ii., p. 1166.

(c) [1891] 3 Ch., at p. 99.

(b) See Strahan and Kenrick,

authorised by the trust instrument or by law. Both in calling in and in investing, he must exercise his discretion as to what is most for the advantage of the trust.

If the trustee has made honest efforts to get in outstanding trust funds and failed, or has honestly and without negligence concluded not to attempt to get them in, on the ground that any effort to get them in would cost the trust fund more than would be thereby realised (a), he is not in default. In the case of new trustees, they are not liable for the default of their predecessors in getting in trust funds, or, indeed, in any other respect; unless they have reason to suspect it (b), and have made no efforts to protect the trust property. A trustee should, unless the trust instrument otherwise directs, realise all wasting and reversionary personalty, when the *cestuis que trustent* take successive interests in the income of the trust estate, and where the personalty is left by will by way of residue (c). If it cannot be realised, then the *cestui que trust* entitled for the time being to the income, should be paid merely interest on the value of the unrealised property, at the rate of three per cent. per annum (d).

As to investing the trust moneys, the securities in which they may properly be invested are often set out in the trust instrument itself (e). Where they are not so set out, and even where they are so set out, unless there is an intention to the contrary expressed in the trust instrument, the trustees may invest the trust property in any of the securities described in section 1 of the Trustee Act, 1893, as amended by the Colonial Stock Act, 1900. The chief of these are, real securities in the United

(a) *Re Brogden* (1888) 38 Ch. D. 546.

(b) *Ex parte Geaves* (1856) 8 D. M. & G., at p. 309.

(c) *Howe v. Lord Dartmouth* (1802) 7 Ves. 137; *Re Van Straubenzee* [1901] 2 Ch. 779.

(d) *Re Woods* [1904] 2 Ch. 4.

(e) Where they are set out and exceed the statutory securities, the Court will construe the words of the instrument very strictly (*Re Maryon-Wilson Estate* [1912] 1 Ch. 55).

Kingdom, Government Stock of the United Kingdom and India, securities the interest of which is guaranteed by Parliament, stock of the Banks of England and Ireland, Metropolitan Stock, and certain railway, water, and municipal stock, colonial stock registered in the United Kingdom in accordance with the Colonial Stock Acts, 1877 to 1900, and any other stocks in which money under the control of the High Court may be invested (a). Though the trustees are entitled to invest in any of these, yet, in making an investment, they must exercise their judgment and discretion in the interest of the *cestuis que trustent*; and in no case are they entitled to invest in an authorised security, when for any reason that particular security is for the time being of a speculative character, that is, has not acquired a fairly fixed value in the market (b). Nor (notwithstanding section 1 of the Trustee Act, 1893) are trustees, unless the trust instrument empowers them so to do, entitled to invest in or hold certificates to bearer issued under (a) the India Stock Certificate Act, 1863, (b) the National Debt Act, 1870, (c) the Local Loans Act, 1875, or (d) the Colonial Stock Act, 1877 (c).

Once the trust moneys are invested, it is the trustees' duty to take proper care of the securities, or, in case of land, of the title deeds. A trustee is not justified in leaving these, even in the hands of his co-trustee, where there is chance of the trust estate being thereby injured (d).

A further duty follows from this duty to preserve the trust property; and that is, that, where there are several *cestuis que trustent*, the trustee must not in any way favour any particular one at the cost of the others. If he gives an undue advantage to one, he is not

(a) See R. S. C., Ord. XXII.  
r. 17.

(b) *Learoyd v. Whiteley* (1887)  
L. R. 12 App. Ca., at pp. 731, 733.

(c) Trustee Act, 1893, s. 7.

(d) See *Re Sisson's Settlement*  
[1903] 1 Ch. 262.

preserving the trust property as far as the others are concerned.

2. *To pay the income and corpus to the proper persons.* Trustees are absolutely bound to pay the income and the *corpus* to the persons entitled under the trust instrument to such income or *corpus* respectively, or to persons entitled through them, of whose title the trustees have notice. If, without negligence, and even through the fraud of some one else (a), they pay it to a person not entitled, they are not thereby discharged of their liability to the person who is entitled. This rule, which is rather a hard one, is mitigated by the fact, that in cases of doubt the trustees are entitled to consult the court, when, if they follow its directions, they incur no liability, and also by the relief that can now be given under the Judicial Trustees Act, 1896 (b).

The duties of the trustee, as set out above, indicate the rights of the *cestui que trust* as against him. The *cestui que trust*, if a life tenant, is entitled to have the income of the trust securities paid to him, and if the trust property is land, at the discretion of the court, to be put in possession of it; subject (1) to a proper indemnity to the trustees in case the land is subject to mesne covenants, and (2) to the retention of the title deeds by them in case the *cestui que trust* has encumbered his equitable interest (c). If the *cestui que trust* or all the *cestuis que trustent* is, or are, absolutely entitled and of full age and capacity, he is, or they are, entitled to put an end to the trust, and demand the complete transfer of the trust property.

3. *To give information to the cestuis que trustent.* The trustees must give all reasonable information to each and all of the *cestuis que trustent* and their solicitors, as to the

(a) *Re Bennison* (1889) 60 L. T. 859.

(b) S. 3. (For a recent case in which a trustee who had actually paid money to the

wrong persons was relieved, see *Re Allsop* [1913] W. N. 283.)

(c) *Re Newen* [1894] 2 Ch. 297; *Re Hunt* [1901] W. N. 144.

state of the trust property, and must furnish evidence, such as inspection of title deeds, accounts, etc., to show this state (a). But they are under no obligation to tell a *cestui que trust* what his own dealings with the beneficial interest have been, or to aid him in making away with such interest (b).

Here, again, the duties of the trustee indicate the right of the *cestui que trust*. That right is to have a proper account of the dealings with, and of the revenue of, the trust property. If this is refused, the court will compel the trustee to account, and may hold the trustee liable for the costs (c). Any trustee or beneficiary may also, subject to the order of the Court, have the accounts of the trust audited, not oftener than once a year, by an independent solicitor or public accountant, or, in default of agreement, by the Public Trustee or some person appointed by him. Such audit will be at the expense of the estate ; unless the Public Trustee otherwise orders (d).

To these positive duties of trustees may perhaps be added two negative ones. First, trustees may not, except so far as is permitted by the settlement, make money out of their trust ; and, second, they may not (except so permitted in the same way) buy, without the sanction of the court, the trust property from their co-trustees. As to the first of these duties, it will be sufficient to refer to the case of a trustee obtaining for his own benefit the renewal of a lease of the trust property (e), and of a trustee receiving a bribe (f) from, or even a share of the profits (g) made by, another person doing work for the trust. In

(a) *Re Skinner* [1904] 1 Ch. 289.

(b) *Per* LINDLEY, L.J., in *Low v. Bouverie* [1891] 3 Ch., at p. 99.

(c) *Re Skinner, ubi sup.* ; *Re Linsley* [1904] 2 Ch. 785.

(d) Public Trustee Act, 1906, s. 13 ; and Rules 37-39.

(e) *Keech v. Sandford* (1726)

Sel. Ch. Ca. 61 ; 2 W. & T. 693 ; *Bevan v. Webb* [1905] 1 Ch. 620.

(f) *Re Smith* [1896] 1 Ch. 71 ; *Chandler v. Bradley* [1897] 1 Ch. 315.

(g) *Re Thorpe* [1891] 2 Ch. 360 ; *Vipont v. Butler* [1893] W. N. 64 ; *Cheese v. Keen* [1908] 1 Ch. 245.

all these cases, the trustee is constructive trustee of the renewed lease, bribe, or profits, as the case may be. As to the second rule, not merely is an active trustee not permitted to purchase trust property from his co-trustees, but one who has retired from the trust is not permitted to purchase it from those who were his co-trustees; unless so many years have elapsed between the retirement and the purchase, as to preclude any suspicion that he retired for the purpose of buying the property (a).

A trustee may purchase the trust property from the *cestui que trust*, if the latter is of full age and capacity, and absolutely entitled. But if he does so, he must make a full disclosure to the *cestui que trust* of all the knowledge he has affecting the value of the trust property, or the sale may afterwards be set aside by the Court; and the *onus* will be upon him to show that he has done so (b).

*Powers.*—Powers or discretions of trustees arise either under the general law or under the settlement. Those arising under the general law, are either powers recognised in equity or powers conferred by statute. The former consists chiefly of such powers as, in the opinion of the Court, are necessary to preserve and protect the trust property, and to benefit those under disability who are entitled beneficially to it. Many of them, as, for example, the power to allow maintenance out of income to infant *cestuis que trustent*, the power to retain a married woman's share in the trust funds to enable her to claim her equity to a settlement, and the power to grant leases of settled lands, have now been either defined or superseded by statute. The most important now of these old equitable powers or discretions, is that which entitles trustees to take proceedings to protect the trust estate. This power is still effective (c); though the usual and most prudent

(a) *Boles' and British Land Company's Contract* [1902] 1 Ch. 244; *Nugent v. Nugent* [1908] 1 Ch. 546.

(b) *Dougan v. Macpherson*

[1902] A. C. 197.

(c) *Re Ormrod's Settled Estate* [1892] 2 Ch. 318; *Re Dunn* [1904] 1 Ch. 648.

way of proceeding, where the trust property is land, is for the trustees to obtain first the sanction of the court to the proposed action under the Settled Land Act, 1882 (*a*).

The statutory powers of a trustee, and those defined by statute, depend now chiefly on the Conveyancing Act, 1881, and the Trustee Act, 1893 (*b*). Those given by the Conveyancing Act, 1881, are, first, a power, where any property is held in trust for an infant, either for life or for any greater interest, and whether absolutely or contingently on his attaining the age of twenty-one, or on the occurrence of any event before his attaining this age, to pay to the infant's parent or guardian, if any, or otherwise for his maintenance, education, or benefit, in the trustee's absolute discretion, the income, or any part of it; whether or not there is any other fund for the infant's maintenance (*c*). The second power is one to manage the infant tenant's land during his minority, and apply the income or part of it at the trustee's discretion for his benefit; but this power is conferred only on trustees appointed for the purpose by the settlement, or, if there are none, on trustees with a power of sale or of consent to a sale, or, if there are none, on trustees appointed for the purpose by the court (*d*). In both cases, the trustees are to accumulate the income not devoted to the infant's maintenance, for the benefit of the person who, in the events that happen, becomes entitled to the property from the income of which the accumulations rise (*e*).

The powers given by the Trustee Act, 1893, are more numerous. Perhaps the most important is that given by section 21 (2). Two or more trustees acting together, or a sole acting trustee, where by the instrument, if any,

(*a*) S. 36.

(*b*) Most of the powers given by the Trustee Act, 1893, are re-enacted from the Conveyancing Act, 1881.

(*c*) Conveyancing Act, 1881, s. 43; *Re Adams* [1893] 1 Ch.

329; *Re Greaves* [1900] 2 Ch. 683.

(*d*) Conveyancing Act, 1881, s. 42; *Re Helyar* [1902] 1 Ch. 391.

(*e*) *Re Bowlby* [1904] 2 Ch. 685.

creating the trust, a sole trustee is authorised to execute the trusts and power thereof, may, if and as he or they may think fit, accept any composition or any security, real or personal, for any debt or for any property real or personal claimed, and may allow any time for payment for any debt, and may compromise, compound, abandon, submit to arbitration or otherwise settle, any debt, account, claim, or thing whatever relating to the trust; and for any of these purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things, as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith (a). This enactment applies only as far as no contrary intention is expressed in the trust deed; but it applies to trusts created before as well as after the commencement of the Act.

The other powers conferred upon trustees by the Trustee Act, 1893, may be put briefly. By section 20, the receipt of trustees for any money or other personal estate, is effectually to exonerate the person paying or transferring the money or personalty from seeing to its application, or being answerable for its loss or misapplication. By section 18, trustees have a power to insure against damage by fire any insurable property, to any amount not exceeding three-fourths of its full value. And, by section 19, they have power to raise money to pay the expense of renewing renewable leaseholds, part of the trust property. Sections 18 and 19 do not, however, authorise the trustees to do anything which they are in the trust instrument expressly forbidden to do.

The powers conferred expressly on trustees by trust instruments vary so widely, and are so numerous, that it is impossible to discuss them here. One only need be mentioned, that is, the usual trust for sale, since it is affected also by the Trustee Act, 1893, and earlier statutes.

(a) *Re Owens* (1882) 47 L. T., at p. 64.



By the combined effect of these, a trustee for sale, or with power to sell, may sell the trust property, either by itself or in conjunction with other property not subject to the trust, according as it appears to him to be for the benefit of the trust funds; and, if the trust was created since January 1st, 1882, he may sell subject to prior charges, and concur with any other person in selling (a). With the leave of the court, he may sell the surface separately from the minerals (b). Where a settlement of land by way of trust for sale, coming into operation after 1911, contains a power to invest money in the purchase of land, such land, when purchased, will be held by the trustees upon trust for sale; *i.e.* it will be deemed, by virtue of the doctrine of conversion, previously described, to be personal estate (c).

Powers, whether arising under statute or under the settlement, may be either absolute or in the nature of trusts. If they are absolute, then, provided the trustee honestly uses his judgment in exercising or refusing to exercise them, the court cannot interfere (d). Most absolute powers have reference rather to the *cestuis que trustent* than the trust estate. Powers in the nature of trusts, on the other hand, are powers which the trustee must exercise; though he may have a discretion, which is in its way absolute, as to how and when they shall be exercised (e). Here, if the trustee refuses to exercise them for an unreasonable time, or exercises them in an improper way, the court may interfere (f). Powers referring to the trust property are usually of this kind (g).

- (a) Trustee Act, 1893, s. 13  
(1).  
(b) *Ibid.* s. 44.  
(c) Conveyancing Act, 1911, s. 10. (See *ante*, pp. 372–374.)  
(d) *Gisborne v. Gisborne* (1877) L. R. 2 App. Ca. 300.  
(e) *Re Hargreaves* [1901] 2 Ch. 547 n.; and see Strahan and S.C.—III.  
Kenrick, *Equity*, pp. 109–111.  
(f) *Tempest v. Lord Camoys* (1882) 21 Ch. D., at p. 578; *Re Courtier* (1886) 34 Ch. D. 136; *Learoyd v. Whiteley* (1887) L. R. 12 App. Ca. 727.  
(g) *Tempest v. Lord Camoys* (1882) 21 Ch. D., at p. 577.

Finally, when a power created by a settlement coming into operation after December 31st, 1881, is vested in two or more trustees jointly, then, unless the contrary is expressed in the instrument creating the power, the power may be exercised by the survivor or survivors of such trustees for the time being (a), and, on the death of the last surviving trustee, by his personal representatives (b).

It may be added, that an order in a suit for the administration of the trusts does not deprive the trustee of his discretion. But henceforth he must exercise it subject to the approval of the court (c).

*Rights.*—The rights of a trustee are of two kinds. First, a right to an indemnity against all costs and liabilities properly incurred by him; second, a right to the guidance and protection of the court in administering the trust.

As to the first of these, when a trustee properly incurs expenses in an action to protect the trust property (d), or in properly defending an action brought against him, either by a stranger or a *cestui que trust*, not in respect of personal misconduct but in respect of the trust estate (e), for something done by him or his agents in discharging the trust, or in managing the trust property (f), he is entitled to a lien both on the *corpus* and on the income of the trust property for them; and where he has had to pay calls or other liabilities on the trust securities, he is not merely entitled to a lien upon these for them, but also has a personal remedy against the *cestui que trust*—at any rate, where the *cestui que trust* is absolutely entitled and of full age and capacity (g). A trustee is also entitled

(a) Trustee Act, 1893, s. 22.

(b) Conveyancing Act, 1911, s. 8.

(c) *Minors v. Battison* (1876) L. R. 1 App. Ca. 428.

(d) *Re Ormrod's Settled Estate* [1892] 2 Ch. 318.

(e) *Walters v. Woodbridge* (1878) 7 Ch. D. 504; *Re Dunn* [1904] 1 Ch. 648.

(f) *Stott v. Milne* (1884) 25 Ch. D. 710.

(g) *Hardoon v. Belilios* [1901] A. C. 118.

to his discharge (though not by deed) (a), on the complete execution of the trust.

As to the second of these rights, the trustee is entitled to the guidance and protection of the court when questions of doubt or difficulty arise, in any of the following ways. First, by taking a direction of a judge under Order LV. rule 3 ; second, by paying the trust money into court to abide the order of the court (b) ; third, where the property cannot be paid into court, by commencing an administration action. The last two, however, are rights of doubtful value ; except in cases where the difficulties of administration are so great as to lead the Court to think that the costs incurred by exercising them are justified. If the Court come to another conclusion, the trustee may find himself compelled to pay such costs out of his own pocket.

*Liabilities.*—We will consider very shortly the question of the liability of a trustee under four heads :—first, his liability for his own acts or omissions ; second, his liability for the acts or omissions of his agents ; third, his liability for the acts or omissions of his co-trustee ; and last, the extent of his liability.

1. Liability for his own acts or omissions.—Any deviation, with whatever intention, by a trustee from an absolute duty, is a breach of trust. Any exercise of a power which causes a loss to the trust property is a breach of trust, unless the trustee acted honestly and with reasonable care and prudence.

What amounts to reasonable care and prudence, is in each case a question of fact ; but as regards loans of trust funds on the security of property a statutory rule has been laid down. By the Trustee Act, 1893 (c), a trustee making such a loan is protected, if he acts on the advice of a surveyor employed by him, whom he reasonably believes to be competent, and advances not more than

(a) *King v. Mullins* (1852) 1 Drew. 308.

(b) Trustee Act, 1893, s. 42.

(c) S. 8.

two-thirds of the value of the property as certified by the surveyor (a). This enactment applies, however, only so far as the proportion of the loan to the value is concerned; it is the duty of the trustee to determine for himself whether the investment should be made (b).

2. Liability for agents.—The principle applicable to a trustee is, that, being a delegate himself, he has no right to delegate his authority to others—*delegatus non potest delegare*. If he chooses to do so, the acts of his agents are regarded as his own; and his liability is just the same as if he himself had done them. To this rule an exception is made, where the agent employed is a mercantile or law agent, and the business transacted is such as is ordinarily transacted in the usual course of business through such agents (c). The most common examples of such agents are solicitors, bankers, and brokers. Here again a statutory rule has been laid down. By the Trustee Act, 1893 (d), a trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable security, payable under a deed containing a receipt therefor, and a banker or solicitor to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of assurance (e). Neither the equitable nor the statutory rule, however, relieves the trustee of responsibility for loss incurred through leaving the property longer than is reasonably necessary in the agent's hands (f), or for loss arising from any other act of negligence (g).

3. Liability for co-trustee.—One trustee is not another trustee's agent, unless he is expressly made his agent by

(a) This imposes no obligation on a trustee to proceed in this way. All it enacts is, that, if he does proceed in this way, he shall not be liable for any loss resulting from the investment. (See *Palmer v. Emerson* [1911] 1 Ch. 758.)

(b) *Learoyd v. Whiteley* (1887)

L. R. 12 App. Ca. 727.

(c) *Speight v. Gaunt* (1883) L. R. 9 App. Ca. 1.

(d) S. 17 (1).

(e) *Ibid.* s. 17 (3).

(f) *Wyman v. Paterson* [1900] A. C. 271.

(g) *Shepherd v. Harris* [1905] 2 Ch. 310.

such trustee ; and therefore his acts are not the acts of the other. Thus, the receipt of trust money by one trustee will not be held a receipt of it by the other ; even though the other joined in the discharge given to the payer for it (a). This latter rule is due to the fact, that a person owing money to the trust cannot obtain a discharge, except from all the trustees ; and so a trustee who signs the receipt without himself obtaining control of the money paid, is said to sign merely for conformity. But again, any negligence on the part of a trustee joining in the receipt for conformity, in leaving the trust money under the sole control of the trustee receiving it, may make him responsible for loss incurred through a breach of trust committed by the latter. It is the duty of the trustee to see that all trust funds are, as soon as possible, invested in the joint names of the trustees, or, in the meanwhile, placed in the bank in their joint names ; and if they neglect this duty, they are liable for the consequences (b).

In two other cases a trustee may be responsible for the acts of his co-trustee. First, where he hands over trust money in his possession to his co-trustee, without seeing to its due application, and, second, where he becomes aware of a breach of trust either committed or meditated, and abstains from taking the needful steps to obtain restitution or redress (c).

In all these cases, however, the trustee may be relieved of liability for his co-trustee's acts by the terms of the trust instrument.

When several co-trustees are parties to a breach of trust, they are jointly and severally liable to the *cestui que trust* to make up the loss (d). If one of them pays it, he may be entitled to recover from each of the others

(a) Trustee Act, 1893, s. 24.

(b) *Re Flower and Metropolitan Board of Works* (1884) 27 Ch. D., at p. 596, *per KAY, J.*

(c) *Wilkins v. Hogg* (1861) 31

L. J.Ch. 41, *per Lord WESTBURY* ; and see *Re Mackay* [1911] 1 Ch. 300.

(d) *Edwards v. Hood-Barrs* [1905] 1 Ch. 20.

a proportionate share. But this 'right to contribution,' as it is called, does not always exist. It does not exist where the breach is fraudulent; the rule in equity (as in law) being, that there is no contribution between joint wrong-doers, merely by reason of their joint wrong-doing. And where one of the trustees is entirely liable for the breach, or where he is an expert (such as a solicitor) and the breach occurred through the other trustees relying on his advice as to matters in which he is an expert, the other trustees are entitled to an indemnity for the loss from him (a). And where one of the defaulting trustees is himself a *cestui que trust*, his interest in the trust fund is applied first to make up the loss (b).

4. Extent of liability.—A trustee is civilly liable for every breach of trust committed by him; he may also be liable criminally. We shall deal first with his civil liability.

Stated generally, when a trustee is guilty of a breach of trust his liability amounts to this—that he must make good the loss incurred by the trust estate, and refund all profits made by him (c) through the breach of trust.

The qualifications due to the rights of *cestuis que trustent* may be summed up in this way. Where the breach consists in improperly selling trust property, the *cestui que trust*, if absolute owner and of full age and capacity, may either adopt the sale and claim the purchase money, or repudiate the sale and claim for breach of trust. Where it consists of improper investment of trust property, he may, in the same way, adopt the investment and claim the securities, or repudiate the investment and claim for breach of trust. Where there are two investments, both of which are improper, and one of which produces profit and the other loss, the *cestui que trust* may adopt the one which produces

(a) *Re Linsley* [1904] 2 Ch. 785.      *Horne* [1905] 1 Ch. 76.)

(b) *Chillingworth v. Chambers* (1874) L. R. 10 Ch. App. 96.

[1896] 1 Ch. 685. (And see *Re*

(c) See *Parker v. M'Kenna*

profit, and claim in respect of the other for breach of trust.

When the *cestui que trust* chooses to proceed for breach of trust, his claim varies accordingly as the trustee has used the trust money for his own purposes or not. If he has not used the trust money for his own purposes, all that the *cestui que trust* can recover is the *corpus* of the money misapplied, with interest at the rate of three per cent. on it. Where, however, the trust money was used for the trustee's private benefit, the *cestui que trust* is entitled to the restoration of the trust money with interest at the rate of five per cent. (a); or, in the alternative, with the profits actually earned (b).

The criminal liability of a trustee depends on section 80 of the Larceny Act, 1861. By that section it is enacted, that a trustee who, with intent to defraud, shall convert or appropriate the trust property to his own use, or for the use of any person other than the *cestui que trust*, or otherwise dispose of or destroy it, shall be guilty of a misdemeanor, and, on being convicted, shall be liable to a maximum punishment of seven years' penal servitude. But criminal proceedings are not to be taken without the sanction of the Attorney- or Solicitor-General, or, if civil proceedings have taken place, of the Judge of the court wherein those proceedings were heard. This criminal remedy does not affect the rights of the *cestui que trust* in law or equity (c).

*Extraordinary rights of the cestui que trust.*—Besides the rights already indicated of the *cestui que trust*, there are two others of a more or less extraordinary nature, which may now be mentioned. The first is the right against strangers meddling in the trust affairs. Where a stranger is knowingly a party to a breach of trust, he becomes a constructive trustee of trust property received

(a) *Re Davis* [1902] 2 Ch. 314.

(c) See *Re Thomas* [1912] 2 Ch.

(b) *Vyse v. Foster* (1872) L. R. 348.

8 Ch. App. 309.

by him, and, as such, is subject to precisely the same obligations and liabilities as an express trustee (a). In the second place, a *cestui que trust* is entitled, not merely as against the trustee, but also as against the trustee's creditors, to 'follow the trust property.' By this phrase is meant, that the *cestui que trust* is entitled to claim, as his own property, any investment into which it can be shown that the trustee had put trust money, in breach of trust.

This right of following the trust funds should be remembered in connection with a further doctrine. Where a trustee mixes trust funds with his own money, by paying the trust money into his private account at a bank, and afterwards draws cheques on that account, it is presumed by equity that, whether the trust funds or his own money were paid in first, he intended first to draw out his own money. Accordingly, the balance remaining to the account is treated as trust money (b). This doctrine has, however, no application to rival beneficiaries claiming against the same mixed fund. In such a case, the Rule in *Clayton's Case* (c) applies; and the first drawings of the trustee will be applied against the first item of trust money paid in, and so on (d).

*Relief of trustee.*—Parliament has now provided relief for a non-fraudulent trustee in three ways.

(1) *By way of limitation of action.* In all cases, except (a) where the breach of trust is fraudulent, (b) where the trust funds are still in the hands of the trustee, (c) where the trust funds have been converted by the trustee to his own use, the trustee, after six years from the breach, may, as against *cestuis que trustent* entitled in possession (even though such *cestuis que trustent* are married women restrained from anticipation), plead the lapse of time as a

(a) *Smith v. Patrick* [1901] A. C. 282.

(b) *Re Hallett* (1880) 13 Ch. D. 696; *Re Oatway* [1903] 2 Ch. 356.

(c) (1816) 1 Mer. 585.

(d) *Re Stenning* [1895] 2 Ch. 433.



bar to an action based upon it. As against *cestuis que trustent* entitled in expectancy only, the six years do not begin to run until their interests vest in possession. A trustee then continues liable to an action till six years after all the interests of the various *cestuis que trustent* are vested (a); but a *cestui que trust* whose right of action is barred, is prohibited from taking any benefit under an action brought by one whose right is not barred (b).

(2) *By way of indemnity.* Where the trustee commits a breach of trust at the instigation or request, or with the consent in writing, of a *cestui que trust*, the Court may, if it thinks fit, impound the interest of the *cestui que trust* in the fund in question, or any part of it, by way of indemnity to the trustee; even though the *cestui que trust* is a married woman entitled for her separate use without power of anticipation (c).

(3) *By way of excuse.* If the court is of opinion that the trustee liable for the breach of trust acted honourably and reasonably, and that he may fairly be excused (d), it may relieve him wholly or partially from personal responsibility for the same (e).

(a) Trustee Act, 1888, s. 8; *Re Timmis* [1902] 1 Ch. 176.

(b) Trustee Act, 1888, s. 8 (2); *Collings v. Wade* [1896] 1 Ir. R. 340.

(c) Trustee Act, 1893, s. 45.

(d) *Perrins v. Bellamy* [1899]

1 Ch. 797; *National Trustees Co. of Australasia v. General Finance Co.* [1905] A. C. 373, s. 3; *Re Allsop* [1913] W. N. 283.

(e) Judicial Trustee Act, 1896, s. 3.

## CHAPTER V.

## OF EQUITIES ARISING FROM CONSTRUCTIVE CONFIDENCE.

THE equities which arise from constructive confidence (that is, where there is no express confidence or undertaking to raise them), may for present purposes be summed up under three heads: (1) mortgages; (2) contracts for sale of land; (3) equitable charges and assignments.

All of these have been referred to incidentally in the earlier parts of the Commentaries, while the first two have been discussed in detail (*a*). It would be mere repetition, therefore, to set out here the relative rights and duties of the mortgagor and mortgagee, or of the vendor and purchaser of land. Besides, we are now considering, not the subject-matter of the jurisdiction of equity, but rather the influence and effect of equitable principles on the law; and, as we have seen, many of those rights and duties now depend neither on equitable principles, nor even on common law principles, but on statutory enactments (*b*). We therefore will give here merely a sketch of the equitable view of these relations.

(1) *Mortgages*.—We have already explained (*c*), at some length, the widely differing views taken by the common law and equity, respectively, of the relationship of mortgagor and mortgagee; and how equity gave effect to its view by establishing the doctrine that an *equity of redemption* (as the mortgagor's interest is called) was just as much his property as the estate of the mortgagee was the property of the latter. We may here, however,

(*a*) See *ante*, vol. i., pp. 201–209; *ib.* p. 358.

(*b*) See *ante*, pp. 363–364.

(*c*) See *ante*, pp. 202–204.

advantageously add a few words upon one of the most effectual steps taken by equity to enforce and supplement that doctrine, viz., by refusing to allow any *clogging of an equity of redemption*.

By 'clogging the equity of redemption' is meant, the entering into an agreement, either in the mortgage deed itself, or contemporaneously with it, for the purpose of preventing or hindering the mortgagor from getting back his land, or getting it back without being liable under any obligation arising out of the mortgage, on his paying all the debt and interest. Thus, an agreement that, on failure to redeem at a given date, the right to do so shall determine, is a clog on the redemption, and therefore void. Again, an agreement giving the mortgagee rights over mortgaged land after the debt and interest are paid off, is also void (a). Similarly, an agreement in the mortgage, postponing, indefinitely or unreasonably, the exercise of the right of redemption (b), or an agreement entitling the mortgagee to purchase the equity (c), is void in equity. And again, any direct agreement in a mortgage that, on failure of punctual payment of principal or interest, a higher sum or rate shall become payable, is also void (d). But this rule is perhaps rather to be attributed to the general dislike of penalties manifested by equity; for, to a certain extent, provisions such as we have just described would seem to encourage redemption rather than to clog it. Moreover, the rule can easily be evaded by making the stipulation in the first instance for the higher sum, with a proviso for reduction

(a) *Rice v. Noakes & Co.* [1902] A. C. 24; *Bradley v. Carritt* [1903] A. C. 253.

(b) *Williams v. Morgan* [1906] 1 Ch. 804; *Morgan v. Jeffreys* [1910] 1 Ch. 620; *Fairclough v. Swan Brewery Co., Ltd.* [1912] A. C. 565. But debentures granted by a company may now

be made irredeemable (*Companies (Consolidation) Act, 1908, s. 103*).

(c) *Samuel v. Jarrah Timber, etc., Co., Ltd.* [1904] A. C. 323.

(d) *Lady Holles v. Wyse* (1693) 2 Vern. 289. But see *General Credit Co. v. Glegg* (1883) 22 Ch. D. 549.

to the lower on punctual payment (a). Still, the whole doctrine of clogging the equity turns largely on the further consideration, that the mortgagor and mortgagee do not deal on even terms, and that therefore the former is especially entitled to the protection of the Court.

It is, however, only fair to point out, that equity has not confined its assistance to the mortgagor; but has, where it has deemed it right, extended valuable help to the mortgagee. The best examples of this latter policy are to be found in the equitable doctrines of 'tacking' and 'consolidation'; the former of which is still fully operative, though the latter has been somewhat restricted by recent legislation.

*Tacking* is a peculiar example of the respect paid by equity to the ownership of the legal estate. If a legal mortgagee, having no notice of the existence of a subsequent (and necessarily equitable) mortgagee, makes a further advance to the mortgagor on the security of the mortgaged property, he may, by 'tacking' the latter to his legal claim, squeeze out, or postpone, any intervening equitable mortgagee of whose incumbrance he had no notice when he made his further advance (b). Further than this, if a third mortgagee or incumbrancer, knowing of the existence of the first mortgage, but (when he lent his money) ignorant of the existence of the second mortgage, procures a transfer to himself of the first and legal mortgage, he may obtain payment of both his claims in priority to the second mortgagee; even though, when he took his transfer, he knew of the existence of the second mortgage (c). Nor need he, when lending his money, inquire if the first mortgagee has received any notice of a second mortgage (d). But if in fact a first mortgagee

(a) *Strode v. Parker* (1694) 2 Vern. 316; *Stanhope v. Manners* (1763) 2 Eden, 199.

(b) *Lloyd v. Attwood* (1860) 29 L. J. Ch., at p. 115; *Hopkinson v. Rolt* (1861) 9 H. L. C. 514.

(c) *Marsh v. Lee* (1670) 2 Vent. 337; *Brace v. Duchess of Marlborough* (1728) 2 P. Wms. 491.

(d) *Tildesley v. Lodge* (1857) 3 Sm. & Giff. 543.

who makes further advances knows, when he does so, of a second, or, as it is called, a *puisné* mortgage, he cannot tack his advance to his legal mortgage ; even though in the latter he had bound himself to make further advances (a).

The doctrine of tacking was formally abolished by the Vendor and Purchaser Act, 1874 (b), but revived, as from the date of its repeal, by the Land Transfer Act, 1875 (c).

*Consolidation* is the principle by which a mortgagor, when the day fixed for redemption has passed, is prohibited from insisting upon the mortgagee executing a reconveyance of the property comprised in the mortgage ; unless at the same time the mortgagor redeems any other mortgage (also in arrear) of the property of the mortgagor which the mortgagee holds (d). The principle is evidently founded on the consideration that, as redemption after the fixed date is a purely equitable privilege, equity may and will place any restriction on its exercise which it deems fair and reasonable. And few criticisms would (probably) have been levied against this principle, had it been confined to transactions in which both mortgages had been arranged between the same parties. But the doctrine has been applied to cases in which a mortgagee has acquired a mortgage upon another property of the mortgagor (e), and also as against a second mortgagee who, when he advanced his money, had no notice that the first mortgagee had at that moment another mortgage on another property of the mortgagor which was an insufficient security (f). The

(a) *West v. Williams* [1899] 1 Ch. 132. And note that the doctrine of tacking has application to charges of interests in land registered under the Land Transfer Acts, 1875 and 1897.

(b) S. 7.

(c) S. 129.

(d) *Pope v. Onslow* (1692) 2 Vern. 286 ; *Cummins v. Fletcher*

(1880) 14 Ch. D. 699.

(e) *Tweedale v. Tweedale* (1857) 23 Beav. 341. Both mortgages must originally have been made by the same mortgagor in order that the mortgagee may be able to consolidate them (*Sharp v. Rickards* [1909] 1 Ch. 109).

(f) *Vint v. Padget* (1858) 3 De G. & J. 611.

doctrine was indeed mitigated by confining it to cases in which both mortgages were effected before any interest by second mortgage or otherwise was acquired in one of the equities of redemption (a). But a much more important change was made by a recent statute, which (b), in effect, enacts that the doctrine of consolidation shall not apply to any mortgage effected after 31st December, 1881, unless a stipulation to the contrary is contained in the mortgage deeds or one of them.

(2) *Contracts for sale of land.*—On the conclusion of a valid contract for the sale of land, either party to it is entitled to regard the equitable title to the land as passing at the date of the contract, and the equitable title to the rents and profits of the land as passing from the time fixed in the contract for completion, or, if no such time be fixed, from the time when the title is or should have been accepted by the purchaser. From the time the purchaser's equitable title to the rents and profits arises, the vendor is entitled to interest on the purchase money.

It follows from this, that, on the fulfilment of the contract, the purchaser must take the land subject to any damage it may have suffered since the date of the contract; while the vendor must take reasonable care that no damage shall happen, or be liable for the consequences. All liability for outgoings rests on him who, for the time, is entitled to the rents and profits.

As between the representatives of a vendor or purchaser who dies before a valid contract for sale, entered into by the deceased, has been completed by conveyance, the contract converts the land, if realty, into personalty, and the purchase money into realty, if the land agreed to be purchased is realty. On such death, the purchaser's heir or devisee now takes the land, subject to liability for the purchase money unpaid at the purchaser's death (c);

(a) *Jennings v. Jordan* (1881) s. 17.

L. R. 6 App. Ca. 698.

(c) Real Estate Charges Acts,

(b) Conveyancing Act, 1881, 1854, 1867, and 1877.

and the purchaser's personal representatives are, consequently, constructive trustees of the contract for him. On the other hand, the purchase money belongs to the vendor's personal representatives as personalty.

(3) *Equitable charges and assignments*.—At common law, the general rule was, that no charge could be imposed on property in any other way than by an instrument capable of transferring the legal title to the property, and that certain kinds of property, and more especially choses in action and property in which the intended assignor had no interest at the time of assignment, could not be transferred at all. On both of these points equity differed largely from the common law.

Equity not merely allowed charges on land to be created by agreement, even without writing, but itself created charges on land without any agreement, where the owner of the land had received value for the charge. Where the charge was created by equity, independently of agreement between the parties, it was usually called a *lien*; but in its nature a lien on land is the same as an equitable charge strictly so called.

Examples of equitable charges created by agreement of the parties are very numerous. Thus, a mortgage of lands may be created by the owner depositing his title deeds with the lender as security for a loan, or by his signing an agreement to deposit them. This is usually called an equitable mortgage by deposit; and, like a mortgage by deed, may be enforced by foreclosure (a). Again, an agreement in writing to create a legal charge will create an equitable one. The most common examples of equitable liens are the liens which vendors who have conveyed property to purchasers, without receiving all the purchase money, have on the property sold, for the unpaid

(a) *James v. James* (1873) L. R. 16 Eq. 153. The mortgagee by deposit has (*semble*) no power of sale; but the Court may, in

his foreclosure action, order a sale at his instance or that of the mortgagor (*Oldham v. Stringer* (1885) 51 L. T. 895).

purchase money, and the liens which purchasers who have contracted to buy property, and advanced part of the purchase money before conveyance, have on the property contracted to be bought, for the purchase money so advanced. These liens, like other equitable charges, bind the property whether realty or personalty, not merely in the hands of the original vendor or purchaser, but also in those of persons taking from him with notice of the lien (a). They are not to be confused with common law liens (b); which entitle the persons having possession of chattels to retain possession of them till certain charges are paid.

The holders of all equitable charges, like the owners of other equitable interests, are liable to be postponed to persons who have acquired the legal estate in the land for value without notice of their charges. Otherwise their rights are much the same as those of legal mortgagees; except that (save when their charge amounts to an equitable mortgage) they have no right to foreclose (c).

As to equitable assignments of property belonging to the assignor, the equitable rule now is: that equity permits any property to be assigned, except where it is made unassignable by a settlement on a married woman, or by special statute, or by the policy of the law, as being contrary to the public interest. Most choses in action have now been made assignable at law; and so this part of the subject has lost most of its importance. There is this difference, however, between the assignment in law and in equity of a chose in action. In law, the assignee steps into the shoes of the assignor, and is entitled to take proceedings in his own name to reduce the chose into possession. If the assignment is equitable merely, then the assignee only becomes entitled to take proceedings in the name of the assignor. And a further

(a) *In re Stucley* [1906] 1 Ch. 179, and *post*, pp. 444–447.

67.

(c) *Re Owen* [1894] 3 Ch. 220.

(b) See *ante*, vol. ii., pp. 176–



difference is : that where a chose in action is assignable at common law, on an assignment of it the assignee takes it absolutely ; but where it is only assignable in equity, he takes subject to all equities arising out of the relations between the assignor and the person liable on the chose in action. The Judicature Act, 1873 (*a*), which makes debts and choses in action assignable at law by writing, retains this equitable characteristic.

As to assignments of property in which, at the time of assignment, the assignor has no property, the law permitted nothing further than a contract undertaking to assign it when it came into possession. If the assignor failed to assign when the property came into his possession, all the assignee could do was to sue him for breach of contract.

Strictly speaking, equity, no more than law, permitted a person to assign property in which, at the time of the purported assignment, he had no interest (*b*). But on the property vesting in the assignor, equity treated the assignment, if made for value, as a declaration of trust of the property for the benefit of the assignee ; and compelled the assignor to execute it accordingly (*c*).

(*a*) S. 25 (6).

(*b*) *Collyer v. Isaacs* (1881) 19 Ch.D., at p. 351, *per* JESSEL, M.R.  
(See further as to assignment of

choses in action, *ante*, vol. ii., pp. 250–251.)

(*c*) See *Pullan v. Koe* [1913] 1 Ch. 9.

## CHAPTER VI.

## OF RECIPROCAL EQUITIES.

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MOST of the subjects which, in a treatise on equity, would come under this head, have, like those properly coming under the last head, been already treated of in the preceding parts of these Commentaries. We will, therefore, consider here only such as have been either not hitherto discussed, or not hitherto discussed sufficiently, and which illustrate especially equitable principles; as opposed to those subjects which, though usually regarded as within the jurisdiction of equity, are only within it by virtue of the fact that the machinery of equity courts is better fitted to deal with them than that of courts of common law.

I. *A wife's equity to a settlement.*—Before the Married Women's Property Act, 1882, the whole law giving married women proprietary rights was (save for the Married Women's Property Act, 1870) the creation of equity. The common law refused to married women the capacity to hold personal property or to dispose of any property. Equity, however, recognised no such incapacity. It conferred on married women the same capacity to hold and dispose of property of every kind as the common law conferred on men and *femes soles*. One difference, however, it allowed (though only in comparatively recent times) as regards disposition. It permitted property to be settled in trust for a married woman, without power of alienation on her part during the coverture. This was altogether contrary to the general principles of equity, which inclined to remove

the common law difficulties in the way of free alienation ; but it was based on a special principle, which, as we have seen, was freely applied as between mortgagor and mortgagee : namely, the duty of equity to protect the weaker party. *The restraint on anticipation*, as this restriction on alienation is usually called, was, in the language of Lord Brougham, recognised, to prevent the husband acquiring the wife's property "by kicks or kisses."

The general subject of married women's property has, however, been already discussed (a) ; and the only matter which properly comes within our present division is one which is becoming every day of less and less importance, namely, a wife's equity to a settlement. When this doctrine arose, a husband was absolutely entitled at law to all the personal property accruing to his wife. Where such property accrued to her directly, that is, where the legal estate vested in her husband in her right, equity could not interfere. But where it was necessary, in order to obtain possession of the property, to apply to a court of equity, such court, on the application of the wife, would, on the principle that he who demands equity must do equity, before handing over the property to the husband, direct him to settle a certain proportion of the funds claimed, for the benefit of the wife and children. Generally speaking, realty, whether the wife's interest was legal or equitable, and life interests in personalty, were not the subjects of equities to settlements. The whole matter, however, is now rather ancient history ; for the Married Women's Property Act, 1882, has made the doctrine obsolete, save as to property the title to which accrued before 1883 to women married before that date.

II. *Administration of a deceased person's estate*.—Again, this subject has already been considered (b). In referring

(a) See *ante*, vol. ii., pp. 414–416. (b) See *ante*, vol. ii., pp. 326–347.

to it now, we can only deal with the points which are especially affected by the principles of equity. These are first, *election*; second, *ademption* or *satisfaction*; and, third, *performance*. In each of these cases, equity endeavours to prevent any one obtaining more than the testator intended he should receive; whether with advantage to justice or not is a matter of private opinion.

*Election*.—By 'election' is meant the choice which equity compels, when a donor gives property to a donee, and at the same time, and by the same instrument, purports to give the donee's property to some one else. Here the donee is put to his election; that is, if he desires to take the property proffered, he must transfer so much of that property of his own which the instrument professes to give to another person; while, if he insists on keeping his own property (or, as it is called 'electing against the instrument'), he must transfer to the disappointed donee, out of the property proffered to himself (the electing party) so much as will compensate the former for his disappointment. Thus if A., a testator, bequeath B.'s leasehold house to X., and 5000*l.* of his (A.'s) own money to B., the latter, if he claims to retain the house, must give to X. so much of the 5000*l.* as is the equivalent of the value of the house. But if the house is worth more than 5000*l.* B. can, of course, repudiate the legacy and keep the house.

The law upon this question may be summed up in the following propositions:—(1) To raise any question of election there must be a gift of the donor's property to the donee (*a*). (2) There must also be an attempted gift of the donee's property by the donor to a stranger (*b*); which gift, if the property had really been the donor's, would have been effectual (*c*). (3) The knowledge or

(*a*) *Bristow v. Warde* (1794) 2 Ves. Jr. 336.

(*b*) *Re Lord Chesham* (1886) 31 Ch. D. 466.

(*c*) *Re Oliver's Settlement* [1905] 1 Ch. 191; *Re Wright* [1906] 2 Ch. 288.

want of knowledge of the donor that the property he attempts to transfer (by will or deed) is the donee's, is immaterial (a). (4) If the donee chuses to elect against the instrument—that is, to keep his own property—the rule is not, that the donee should forfeit all his interest in the gift, but that he shall make compensation, based on the value of the property which he elects to keep, as it stood at the time of the settlement taking effect, to the person to whom the donee's property was left (b).

*Ademption and satisfaction.*—‘Ademption’ may be defined as the making of a gift with the express or implied assumption that it is to be as a total or partial extinguishment of a previous promised gift; ‘satisfaction,’ as the making of a gift with the express or implied intention that, if accepted by a creditor, it shall be a total or partial extinguishment of his debt or obligation against the donor. It is always a question of fact whether a gift is or is not an ademption or satisfaction; and, in the case of gifts by will, extrinsic evidence is admissible to show what was the motive of the gift (c).

We will consider the subject under four heads.

(i.) *Satisfaction of debts by legacies.*—This is the subject of two conflicting maxims. The first is, that a legacy imports a bounty; and, therefore, that a legacy should not be regarded as a satisfaction of a debt of the testator. The second is: that a debtor is not presumed to give, but to pay; and therefore a legacy is to be regarded as a satisfaction of a debt, where there appears to be no reason to hold the contrary (d). Reconciling as far as possible these principles, it has been held as follows:—(i.) that a legacy of a smaller amount than the debt owed by the deceased testator to the legatee,

(a) *Theellusson v. Woodford* (1806) 13 Ves. 209.

(b) *Re Hancock* [1905] 1 Ch. 16; *Re Booth* [1906] 2 Ch. 321.

(c) *Hall v. Hill* (1841) 1 Dr. &

W., at p. 132.

(d) *Re Horlock* [1895] 1 Ch., at p. 522; *Re Rattenberry* [1906] 1 Ch. 667,

is not a satisfaction of the debt (a) ; (ii.) that where the legacy is given for a particular purpose, or from an expressed particular motive, there is no satisfaction, unless that particular purpose or motive happens to be the extinguishment of the debt (b) ; (iii.) that where the legacy and the debt are of different characters, *e.g.*, the debt a lump sum and the legacy an annuity, this cannot be held a satisfaction (c) ; (iv.) that where at the time the will was made there was no debt due to the legatee by the testator, the legacy cannot be a satisfaction (d) ; (v.) that where the debt and the legacy were payable at different times or under different circumstances the legacy is not in satisfaction (e) ; (vi.) that where the legacy is by way of residue, it being of uncertain value, it cannot be in satisfaction (f) ; (vii.) that where there is an express direction to pay debts and legacies, the legacy given is not a satisfaction of the debt (g).

(ii.) *Ademption of legacies by legacies.*—This is usually treated as a doctrine of equity ; but really it is purely a matter of construction. Whether a legacy is intended to be substituted for another legacy must of course depend, not upon any principle of equity, but on the intention of the testator. The presumption, however, is, that two legacies of the same amount, given in the same will, to the same person, are not intended to be separate, but to be the same gift. If, however, the gifts are of unequal value, or are in different wills, the presumption is that they are separate gifts, and therefore cumulative (h).

(iii.) *Ademption of legacies by portions.*—There is a presumption of law, that a parent, or one *in loco parentis*,

(a) *Crichton v. Crichton* [1896]

1 Ch., at p. 876.

(b) *Re Fletcher* (1888) 38 Ch.

D. 373.

(c) *Richardson v. Elphinstone*  
(1794) 2 Ves. Jr. 462.

(d) *Thomas v. Bennet* (1725) 2  
P. Wms. 343 ; *Fowler v. Fowler*

(1735) 3 P. Wms. 353.

(e) *Re Horlock, ubi sup.*

(f) *Devese v. Pontet* (1783) 1  
Cox, 188.

(g) *Re Huish* (1889) 43 Ch. D  
260.

(h) *Adnam v. Cole* (1843) 6  
Beav. 353.

does not intend to give what are called double portions—that is, a double share in his estate—to any child or adopted child. Accordingly, where by his will such a person has given to a child or adopted child a legacy, and afterwards he, on such child's marriage, or on some other occasion, gives a portion to the child, this will be considered a satisfaction of the legacy until the contrary is shown (a).

(iv.) *Satisfaction of portions by legacies.*—The rule here is much the same as in the case of ademption of legacies by portions. There is only this difference, that, where a child is entitled to a portion, no act of its parent can deprive it of the right of electing whether it will take the legacy or the portion (b).

- III. *Performance.*—The distinction between satisfaction and performance is somewhat thin. As far as there is any real distinction it is this: 'satisfaction' is the substitution of a gift for a legal debt or obligation; 'performance' is the actual carrying out of the legal debt or obligation. The matters which most commonly arise in respect to performance may be arranged under three heads:—

(i.) *Covenant to settle land belonging to the covenantor.*—When the owner of land enters into a binding covenant to settle it, this covenant constitutes a lien on the land; which lien is binding on subsequent purchasers with notice, and volunteers, and also on the covenantor's creditors and trustee in bankruptcy (c).

(ii.) *Covenant to settle land not yet belonging to the covenantor.*—Where this covenant is to buy and settle specified land, a purchase of the land in question will be regarded as a performance; and there will, immediately

(a) *Re Furness* [1901] 2 Ch. 346; *Re Scott* [1903] 1 Ch. 1.

(b) *Re Blundell* [1906] 2 Ch. 222.

(c) *Fremoult v. Dedire* (1718) 1

P. Wms. 429. (Of course, now subject to s. 47 of the Bankruptcy Act, 1883, and s. 13 (2) of the Bankruptcy Act, 1913.)

on such purchase, arise a lien in respect of the covenant (a). Where, however, the covenant refers, not to specified land, but merely to land of a given value, or kind, then, though the purchase of land of the kind covenanted to be settled will be regarded as a performance of the covenant, no lien will attach to the land purchased (b).

(iii.) *Covenant to leave property by will*.—Where a person enters into a covenant to leave by will property to a certain value, such covenant will be regarded as performed, if the covenantee receives in any way property of the value in consequence of the death of the covenantor. Thus, if the covenantor dies intestate, and the covenantee receives, as widow or next of kin, property of the value agreed to be bequeathed, this will constitute a performance of the covenant. Even if the property so received is of less value, that will be a performance *pro tanto* of such covenant (c).

A covenant to leave property does not in any way interfere with the right of the covenantor to deal as he likes with his property during his life. He may use it or give it away as he thinks proper. The only test of the validity of his acts is: whether or not they were *bonâ fide* (d).

(a) *Tooke v. Hastings* (1689) 2 Vern. 97.

(b) *Fremoult v. Dedire* (1718) 1 P. Wms. 429; *Lechmere v. Carlisle* (1733) 3 P. Wms. 212.

(c) *Blandy v. Widmore* (1716) 1 P. Wms. 324.

(d) *Cochran v. Graham* (1812) 19 Ves. 63; *Fortescue v. Hennah* (1812) *ib.* 67.



## CHAPTER VII.

OF THE REDRESS OF INJURIES BY THE ACT OF THE  
PARTIES.

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THE remedies for civil injuries are generally obtained by means of legal proceedings instituted in a court of justice ; and, accordingly, the rest of this Book will be mainly concerned with a description of the courts of justice established in this country, and of the procedure adopted by them. But, in spite of the dislike with which such tribunals, no less than other organs of the State, regard extra-judicial remedies, as tending to violence and oppression, yet our law undoubtedly recognises, if it does not encourage, the existence of a few of such remedies, of which it will be better to give some account, before proceeding to deal with the main subject of the book. This course, it may be added, is not only practically convenient, but historically sound ; for most (though not quite all) of these extra-judicial remedies are survivals from very ancient days, when courts of justice in this country had not yet attained their present complete organisation.

These extra-judicial remedies comprise the following varieties of redress, namely,—(1) self-defence ; (2) recaption or reprisal ; (3) entry ; (4) abatement ; (5) lien ; (6) distress ; (7) the seizure of heriots ; (8) accord and satisfaction ; (9) arbitration ; (10) retainer ; and (11) remitter. Of these in their order.

[ (1) *Self-defence*.—If a man be forcibly attacked, without legal warrant, in his person or property, it is

[lawful for him to repel force by force ; any breach of the peace which may ensue being chargeable upon him only who began the affray (*a*). But no more force must be used than is reasonably necessary ; for, if the resistance exceed the bounds of mere defence, then the defender himself becomes the aggressor (*b*). And what a man may do in his own defence, he may also do in defence of his wife, or of his child, or of his servant ; also, a child may defend his parent, and a servant his master.

(2) *Recaption or reprisal*.—This mode of redress may be resorted to when any one wrongfully deprives another of his goods. The owner of the goods may retake them, wherever he happens to find them ; provided he can do so without committing a trespass or a breach of the peace (*c*). If, for instance, my horse is wrongfully taken away, and I find him on a common, or in a fair, or at a public inn, I may lawfully retake him into my possession. But if he is in a private stable, or in private grounds, not being those of the wrong-doer (*d*), I may not break open the stable or break into the private grounds to take him out (*e*). My only remedy in such case is to bring an action to recover the animal or his value, together with damages for the detention (*f*).]

(3) *Entry*.—A person who has been wrongfully dispossessed of land may enter upon it and retake possession ; provided he can do so peaceably (*g*). But a forcible entry is an indictable offence (*h*) ; and even if a person

(*a*) 2 Roll. Abr. 546 ; 1 Hawk. P. C. 131 ; Bac. Abr. *Master and Servant* (P.).

(*b*) 1 Hale, P. C. 485, 486.

(*c*) *Blades v. Higgs* (1861) 10 C. B. N. S. 713. (This case suggests that, if a man is entitled to possession of goods, he may take them, even though they have not been taken out of his previous possession. But the decision has not in this respect met with complete approval.)

(*d*) *Patrick v. Colerick* (1838) 3 M. & W. 483.

(*e*) *Anthony v. Haney* (1832) 8 Bing. 186.

(*f*) *Higgins v. Andrewes* (1618) 2 Roll. Rep. 55, 56 ; *Masters' and Poolie's Case* (1621), *ib.* 208 ; *Chilton v. Carrington* (1855) 15 C. B. 730.

(*g*) Co. Litt. 252.

(*h*) 5 Ric. 2 (1381) st. 1, c. 7 ; 15 Ric. 2 (1391) c. 2 ; 31 Eliz. (1589) c. 11 ; 4 Inst. 176 ; 21

who has a legal right to enter upon land in the possession of a wrong-doer, is allowed to enter peaceably, it is illegal for him to turn out the wrong-doer with violence (a). The person who was wrongfully in possession cannot, however, maintain an action of trespass to land against a person entitled to possession who has been guilty of a forcible entry; though, if he has been assaulted in the process, he may recover damages for the assault (b).

(4) *Abatement*.—A fourth species of remedy by the mere act of the party injured, is when he ‘abates,’ that is, removes a nuisance. A nuisance may be abated by the party aggrieved thereby; provided he does not commit a breach of the peace or an unjustifiable trespass, and does not cause any damage beyond what the removal of the nuisance necessarily involves (c). Entry on the land of another to abate a nuisance is a trespass, and is not justifiable except in case of immediate danger, or where the entry is made on the land of the person committing the nuisance; and, even in the latter case, notice must first be given to him requesting him to remove it, unless the nuisance is caused by a positive act. Thus, if a house or wall or gate is erected by my neighbour which obstructs my right of way or my right of common, I may pull it down; but, if the house is inhabited, proper notice must first be given to those in the house requesting them to remove it, and, if they refuse, I may pull it down, provided that I do not occasion any unnecessary damage, nor commit a breach of the peace (d). Where, however, the

Jac. 1 (1624) c. 15; *R. v. Wilson* (1835) 3 A. & E. 817; *R. v. Harland* (1838) 8 A. & E. 826; *Lowes v. Telford* (1876) L. R. 1 App. Ca. 414.

(a) *Edwick v. Hawkes* (1881) 18 Ch. D. 199.

(b) *Newton v. Harland* (1840) 1 Man. & G. 644; *Harvey v. Brydges* (1845) 14 M. & W. 442; *Beddall v. Maitland* (1881) 17

Ch. D. 174.

(c) *Lodie v. Arnold* (1696) 2 Salk. 458; *Cooper v. Marshall* (1757) 1 Burr. 259; *Houghton v. Butler* (1791) 4 T. R. 364; *Dimes v. Petley* (1850) 15 Q. B. 276.

(d) *Davies v. Williams* (1851) 16 Q. B. 546; *Roberts v. Rose* (1865) L. R. 1 Ex. at p. 89; *Lane v. Capsey* [1891] 3 Ch. 411. (It is doubtful, however, whether

nuisance can be abated without entering on another's land, no notice need be given of the intention to remove it. Thus, the owner of land which is overhung by trees growing on his neighbour's land, is entitled, without notice and without trespassing on his neighbour's land, to cut the branches, so far as they overhang his own land (a).

(5) *Lien*.—Another mode of enforcing a right without the necessity of bringing an action is by the exercise of a *possessory lien*; which means the right of retaining possession of a thing belonging to another until a debt due from the owner of it is paid, and must, as before observed (b), be carefully distinguished from an equitable lien on land, which is not, necessarily, accompanied by possession, and which is enforced by means of legal proceedings. A possessory lien is either *particular* or *general*. A lien is *particular*, when the right of retention is limited to the specific thing to which the debt or claim relates, and out of which it arises. It is *general*, when the right of retention is not so limited, but may be exercised to enforce payment of a general balance of account due from the owner of the thing retained. A particular lien may arise by operation of law or be conferred by contract. A general lien is not favoured by the law, and can arise only from contract, which may be express, or implied from custom, which, however, may be so notorious as almost to amount to a law.

The following are illustrations of particular liens which arise by operation of law. A carrier by land or by sea has a lien on the goods carried for the cost of their carriage, and is entitled to refuse to deliver them until the cost of carriage is paid. An innkeeper has a lien on the luggage brought by a guest to the inn for the cost of his board

in general notice is not necessary, 761).

in the absence of urgency, in the case of all other nuisances caused merely by omission (*Jones v. Williams* (1843) 11 M. & W.

(a) *Lemmon v. Webb* [1895] A. C. 1.

(b) See *ante*, p. 432.

and lodging (a). An artificer, who repairs or otherwise bestows labour or skill upon a thing sent to him by its owner for the purpose, has a lien on it for the amount of the remuneration due to him for his work (b). An unpaid seller of goods, the property in which has passed under the contract to the buyer, is entitled, in the absence of agreement to the contrary, to retain possession of them until the buyer pays the price (c). If the seller has delivered them to a carrier for transmission to the buyer, he is entitled, if the buyer becomes insolvent, to stop them *in transitu*, and to get possession of them from the carrier, and retain them until payment of the price (d).

A particular lien confers no right of sale at common law; but merely the right to retain the thing until payment of the debt in respect of which the lien is given (e). A right of sale may, however, be given in any case by express contract; and is given in some cases by statute. Thus, an unpaid seller of goods may re-sell them, if they are of a perishable nature, or if the buyer, after receiving notice of the seller's intention to re-sell, does not, within a reasonable time, pay or tender the price (f). A ship-owner, also, may, under the Merchant Shipping Act, 1894 (g), enforce his lien for freight by warehousing and selling the goods carried; and an innkeeper has a power of sale under the Innkeepers Act, 1878 (h).

The following are illustrations of *general* liens which exist by virtue of custom. A factor entrusted in the ordinary course of his business as a mercantile agent with

(a) *Mulliner v. Florence* (1878) 3 Q. B. D. 484; *Robins v. Gray* [1895] 2 Q. B. 501.

(b) *British Empire Shipping Co. v. Somes* (1860) 8 H. L. C. 338; *Williams v. Allsup* (1861) 10 C. B. N. S. 417; *Bruce v. Everson* (1883) 1 Cab. & E. 18.

(c) Sale of Goods Act, 1893, ss. 41-43.

(d) *Ibid.* s. 44. (See *ante*, vol. ii., pp. 163-164.)

(e) *Mulliner v. Florence* (1878) 3 Q. B. D. 484.

(f) Sale of Goods Act, 1893, s. 48.

(g) Ss. 492-499.

(h) 41 & 42 Vict. c. 38. (As to liens, see *ante*, vol. ii., pp. 176-180.)

the goods of another, for the purpose of selling them, has, in the absence of agreement to the contrary, a lien on them for a general balance of account due to him from his principal (a). A solicitor has a lien on the deeds and documents of his client for his professional charges (b). An insurance broker employed by a shipowner or merchant to obtain from underwriters a policy of insurance on a ship or on goods is, as a general rule, the only person liable to the underwriters for the premiums; and he has a general lien on the policy for the premiums and his commission, and also for the amount of the general balance of his insurance account with the shipowner or merchant who employed him (c). A banker has, in the absence of express or implied agreement to the contrary (d), a general lien on all negotiable securities placed by a customer in his hands as banker, in respect of any balance due to him from his customer—as, for example, when the customer has overdrawn his current account; and the banker may retain possession of such securities so long as a balance remains due to him (e). Stockbrokers have also a general lien on securities, placed in their possession by or on behalf of a customer in the ordinary course of their business, for any balance due from the customer or any Stock Exchange transactions between them (f). Generally speaking, neither particular nor general liens can be enforced against the interests of third parties, *i.e.* persons other than those from whom the debt claimed is due (g). But there are, possibly, a few exceptions, *e.g.* in the case of common carriers, who are compelled to receive

(a) *Baring v. Corrie* (1818) 2 B. & Ald. 137.

(b) *Cowell v. Simpson* (1805) 16 Ves. 275.

(c) *Olive v. Smith* (1813) 5 Taunt. 56; *Cahill v. Dawson* (1857) 3 C. B. N. S. 106.

(d) *Bock v. Gorrisen* (1860) 30 L. J. Ch. 39. See also *Stumore v. Campbell* [1892] 1 Q. B. 314.

(e) *Brandao v. Barnett* (1846) 12 Cl. & F. 787; *Misa v. Currie* (1876) L. R. 1 App. Ca., at p. 569.

(f) *In re London and Globe Finance Corporation* [1902] 2 Ch. 416; *Hope v. Glendinning* [1911] A. C. 419.

(g) *Buxton v. Baughan* (1834) 6 C. & P. 674.

goods for carriage (*a*), and innkeepers, who are compelled to receive guests (*b*).

(6) *Distress*.—As the law of distress is a subject of great use and importance, it shall here be considered with some minuteness.

A landlord or other person legally entitled to the payment of any kind of rent (*c*) may distrain for it, if it is in arrear, by seizing the goods (with the exceptions hereinafter mentioned), which he may find on the premises out of which the rent issues, and holding them as a pledge or security for the payment of the arrears, or selling them to satisfy his claim. The remedy is incident at common law to the relationship of landlord and tenant; and, where the rent claimed is rent-service, this relationship must, at the common law, be subsisting at the time the rent is payable and also at the time the distress is made (*d*). By statute (*e*), however, a landlord may, within six months after the determination of a lease, distrain for arrears of rent, where the tenant continues to hold over after the expiration of the term (*f*). The person in whom the legal reversion is vested is the person entitled to distrain (*g*); such as the lessor (*h*), or an assignee of the reversion for rent which has fallen due after the assignment (*i*), or a mortgagee entitled to payment of rent under a lease granted by the mortgagor (*k*).

The remedy is, however, now available for the recovery

(*a*) *Yorke v. Grenaugh* (1703)  
2 Ld. Raym., at p. 867.

(*b*) *Threfall v. Borwick* (1872)  
L. R. 7 Q. B. 711, 10 Q. B. 210;  
*Gordon v. Silber* (1890) 25 Q. B.  
D. 491; *Keene v. Thomas* [1905]  
1 K. B. 136.

(*c*) Landlord and Tenant Act,  
1730; Conveyancing Act, 1881,  
s. 44.

(*d*) *Murgatroyd v. Old Silk-*  
*stone Co.* (1895) 65 L. J. Ch. 111.

(*e*) Landlord and Tenant Act,  
1709 (8 Anne, c. 14), ss. 6, 7.

(*f*) *Taylorson v. Peters* (1837)  
7 A. & E. 110; *Kirkland v.*  
*Briancourt* (1890) 6 T. L. R. 441;  
*Wilkinson v. Peel* [1895] 1 Q. B.  
516.

(*g*) *Lewis v. Baker* (1905) 21  
T. L. R. 17.

(*h*) *Smith v. Day* (1837) 2 M.  
& W. 684; *Serjeant v. Nash,*  
*Field & Co.* (1903) 19 T. L. R. 510.

(*i*) *Parmenter v. Webber* (1818)  
2 Moore, 658.

(*k*) *Moss v. Gallimore* (1779)  
1 Dougl. 279.

of any kind of rent (*a*), or for the apportioned part of a rent ; provided the rent is certain in amount, or is capable of being reduced to a certainty, and is in arrear. Rent is usually payable at the end of the period for which it is due. But it may be made payable in advance ; and, in either case, it is not in arrear until the day after the day fixed for payment. The amount of arrears recoverable is limited by statute (*b*) to six years' rent ; but where the holding is one to which the Agricultural Holdings Acts apply, the landlord cannot distrain for rent that is more than twelve months overdue (*c*). Under the Bankruptcy Act, 1890 (*d*), the goods of a bankrupt tenant cannot, after the commencement of the bankruptcy, be distrained for more than six months' rent, if the rent has accrued due before the order adjudicating him bankrupt ; and, by the Bankruptcy Act, 1913 (*e*), further restrictions are placed upon the right of distress in the event of the tenant's bankruptcy. By the Companies (Consolidation) Act, 1908 (*f*), a distress cannot be made without leave (*g*) of the Court against the effects of a company, after the commencement of a winding-up by or under the supervision of the Court (*h*).

As regards the things which may be taken in distress, the general rule formerly was and, to a certain extent, still is : that any moveable chattels, which are on the

(*a*) See Landlord and Tenant 709.

Act, 1730 ; Conveyancing Act, 1881, s. 44 ; *Bradbury v. Wright* (1781) 2 Dougl. 624 ; *Newman v. Anderton* (1806) 2 Bos. & P. (N. R.) 224 ; *Buttery v. Robinson* (1826) 3 Bing. 392 ; *Rivis v. Watson* (1839) 5 M. & W. 255 ; *Giles v. Spencer* (1857) 3 C. B. N. S. 244.

(*b*) Real Property Limitation Act, 1833, s. 42.

(*c*) But see *Ex parte Bull* (1887) 18 Q. B. D. 642 ; *Crosse v. Welch* (1892) 8 T. L. R. 401, and

(*d*) S. 28. And see *Brocklehurst v. Lawe* (1857) 26 L. J. Q. B. 107 ; *Ex parte Hale* (1876) 1 Ch. D. 285 ; *Re Howell* [1895] 1 Q. B. 844.

(*e*) S. 18.

(*f*) Ss. 140, 142, 211.

(*g*) *Re Oak Pitts Co.* (1882) 21 Ch. D., at p. 329 ; *Shackell v. Chorlton* [1895] 1 Ch. 378 ; *Re Higginshaw Co.* [1896] 2 Ch. 544.

(*h*) *Re Roundwood Co.* [1897] 1 Ch. 373.



premises at the time the distress is made, may be seized, whether belonging to the tenant or not (*a*), but not any chattel, whether belonging to the tenant or not, which is not on the premises out of which the rent issues. To this rule there are many common law and statutory exceptions. The following kinds of chattels are absolutely privileged from distress at the common law, and cannot lawfully be seized for rent under any circumstances:—

(*a*) *Wild animals* (in which there can be no absolute property).

(*b*) Things in the *actual use* (*b*) of any person at the time the distress is made; as, for example, an axe with which a man is cutting wood (*c*), a stocking frame on which a person is actually engaged in weaving, or a horse which a man is riding (*d*). (These are probably privileged because an attempt to seize them might provoke a breach of the peace.)

(*c*) Things belonging to a third party which have been delivered to a person carrying on a public trade on the demised premises to be dealt with *in the way of his trade* (*e*); as, for example, a horse sent to a smith to be shod, cloth to a tailor to be made into a coat, corn to a mill to be ground, or goods delivered to a carrier for carriage, or to an auctioneer or commission agent to be sold, or pledged with a pawnbroker, or stored in a wharfinger's warehouse (*f*). To come under this

(*a*) *Francis v. Wyatt* (1764) 3 Burr. 1498; *Crosier v. Tomkinson* (1759) 2 Keny. 439; *Parsons v. Gingell* (1847) 4 C. B. 545.

(*b*) *Storey v. Robinson* (1795) 6 T. R. 138.

(*c*) *Simpson v. Hartopp* (1744) Willes, 512.

(*d*) *Storey v. Robinson* (1795) 6 T. R. 138; *Field v. Adames* (1840) 12 A. & E. 649.

(*e*) *Gisbourn v. Hurst* (1709) 1 Salk. 249; *Muspratt v. Gregory* (1838) 3 M. & W. 677; *Joule v. Jackson* (1841) 7 M. & W. 450; *Gibson v. Ireson* (1842) 3 Q. B. 39; *Findon v. McLaren* (1845) 6 Q. B. 891; *Miles v. Furber* (1873) L. R. 8 Q. B. 77.

(*f*) *Williams v. Holmes* (1853) 8 Exch. 861; *Lyons v. Elliott* (1876) 1 Q. B. D. 210.

ground of privilege, the thing must have been sent or delivered to the tenant (a), to be dealt with by him in the way of a public trade carried on by him (b). (The reason for the privilege is: that trade would be discouraged if a tenant's customers were exposed to the risk of having their goods seized.) But the importance of this exception is much diminished by the effect of the Law of Distress Amendment Act, 1908, hereafter explained.

- (d) Things in the *custody of the law* (c); such as goods which have been taken in execution of a judgment, or are in the possession of a receiver appointed by the Court (d), or have been already taken in distress. But, by the County Courts Act, 1888 (e), where goods are being taken by a bailiff in execution of a County Court judgment, the landlord of the premises may, by giving written notice to the bailiff, require him to distrain also for the rent in arrear, not exceeding the rent of four weeks, where the tenement is let by the week, or the rent of two terms, where it is let for any other term less than a year, and in any other case not exceeding the rent of one year (f), and to sell enough of the tenant's goods to satisfy such rent, in priority and addition to the amount for which the execution warrant has been issued. If the bailiff, after receiving proper notice of the landlord's claim, disregards it, he may be held liable in an action for damages (g) for the amount of the rent thereby lost to the landlord.

(a) *Clarke v. Millwall Docks* (1886) 17 Q. B. D. 494.

(b) See *Challoner v. Robinson* [1908] 1 Ch. 49.

(c) Co. Litt. 47 a; *Lyons v. Elliott*, *ubi sup.*

(d) *Sutton v. Rees* (1863) 32 L. J. Ch. 437.

(e) S. 160. And see *Hughes v. Smallwood* (1890) 25 Q. B. D. 306.

(f) In certain circumstances, the period is limited to six months (Bankruptcy Act, 1913, s. 18 (2)).

(g) *Wren v. Stokes* (1902) 1 Ir. R. 167.

- (e) *Perishable goods*, such as meat (a) or milk ; for, by the common law, a distress was merely a pledge, and could not be sold, and such goods cannot after seizure be restored to the owner in the same condition on payment of the rent. But, by virtue of statute (b), hay or corn, as soon as it is reaped, may be distrained ; and so also may growing corn or crops.
- (f) *Loose money* ; but not money in a sealed bag (c).
- (g) *Fixtures*, or things fixed to the freehold, which cannot be removed without damage to the freehold, such as fixed machinery, or which form part of the freehold, such as kitchen ranges, grates, keys, or title deeds (d).
- (h) *Chattels of the Crown*, e.g. a horse lent to a member of the Yeomanry (e).

The following things are absolutely privileged by statute :—

- (a) Under the Agricultural Holdings Act, 1908 (f), re-enacting in this respect the provisions of the Agricultural Holdings Act, 1883, *machinery belonging to a third party* and lent to the tenant of an agricultural holding under a *bonâ fide* agreement, or live stock lent solely for breeding purposes.

- (b) Under the Law of Distress Amendment Act, 1888 (g), the *wearing apparel and bedding* (h) of the tenant

(a) *Morley v. Pincombe* (1848) 2 Exch. 101.

(b) 2 W. & M. (1689) c. 5, s. 3 ; Distress for Rent Act, 1737, s. 8 ; *Miller v. Green* (1831) 8 Bing. 92.

(c) 1 Roll. Ab. 667 ; Vin. Abr. Dist. (H.) ; *Wilson v. Duckett* (1675) 2 Mod. 61.

(d) *Niblet v. Smith* (1792) 4 T. R. 504 ; *Darby v. Harris* (1841) 1 Q. B. 895 ; *Dalton v. Whittem* (1842) 3 Q. B. 961 ;

*Hellawell v. Eastwood* (1851) 6 Exch. 295 ; *Turner v. Cameron* (1870) L. R. 5 Q. B. 306 ; *Crossley v. Lee* [1908] 1 K. B. 86 ; *Provincial Billposting Co. v. Low Moor Iron Co.* [1909] 2 K. B. 344.

(e) *Secretary of State for War v. Wynne* [1905] 2 K. B. 845.

(f) S. 29.

(g) S. 4 ; and County Courts Act, 1888, s. 147.

(h) Which includes bedstead

and his family, and the tools and implements (a) of his trade, not exceeding 5*l.* in value (b).

- (c) Under the Law of Distress Amendment Act, 1908, amplifying the principle of the Lodgers' Goods Protection Act, 1871, which is thereby repealed in so far as it is replaced, the antient severity of this branch of the law is still further mitigated (c). For by this recent statute—(1) any lodger, (2) most under-tenants, and (3) most other persons not being tenants of the premises and having no beneficial interest therein, can, by complying with the terms of the statute, protect their goods, the lodger and under-tenant from distress for rent due from their immediate landlords, and other persons from distress for rent owed by the tenant of the premises on which the goods may be situate. To obtain this protection, the claimant must, after the distress has been levied or authorised, serve on the distraining landlord or bailiff a written declaration and inventory. The declaration must state that the goods distrained or threatened are the property or in the lawful possession of the claimant, and that the immediate tenant has no property or beneficial interest therein; and (in the case of an under-tenant or lodger) must also state what rent, if any, is due from him to his immediate landlord, and contain an undertaking to pay to the superior landlord any rent so due or to become due from him to his immediate landlord, until the arrears of rent have been paid off. To the

(*Davis v. Harris* [1900] 1 Q. B. 729).

(a) Though used only by his wife (*Churchward v. Johnson* (1889) 54 J. P. 326). (See also *Masters v. Fraser* (1901) 85 L. T. 611; *Boyd, Ltd. v. Bilham*

[1909] 1 K. B. 14.)

(b) Cab over 5*l.* in value held to be protected; because the only chattel on the premises (*Lavell v. Ritchings* [1906] 1 K. B. 480).

(c) *Challoner v. Robinson* [1908] 1 Ch. 49.

declaration, in either case, must be annexed a correct inventory, subscribed (a) by the claimant of the goods referred to in the declaration. It is a misdemeanor for a claimant to make or subscribe a declaration or inventory knowing it to be untrue in any material particular (b). If, after the claimant has so complied with the terms of the Act (c), the distraining landlord, or his bailiff (d), proceeds to distrain the claimant's goods, he is guilty of an illegal distress, and is liable to be sued for damages (e); but the claimant may, instead of bringing an action for damages, apply to a court of summary jurisdiction for an order for the restoration of the goods. Certain under-tenants and other persons, such as the spouse of the tenant whose rent is in arrear, or the grantee of a bill of sale given by the tenant, are excluded from the benefit of the provisions of the Act (f).

- (d) Under various statutes, railway rolling stock (g), gas meters or fittings belonging to a gas company (h), or water (i) or electric light (k) fittings belonging to water supply or electric light companies, frames, looms, and other plant used in textile

(a) *Godlonton v. Fulham Property Co.* [1905] 1 K. B. 431.

(b) Perjury Act, 1911, s. 5.

(c) *Thwaites v. Wilding* (1883) 12 Q. B. D. 4.

(d) *Lowe v. Dorling* [1906] 2 K. B. 772.

(e) *Phillips v. Henson* (1877) 3 C. P. D. 26; *Sharp v. Fowle* (1884) 12 Q. B. D. 385; *Hea-wood v. Bone* (1884) 13 Q. B. D. 179.

(f) Ss. 4, 5; *Shenstone v. Freeman* [1910] 2 K. B. 84; *Rogers, Eungblut & Co. v. Martin* [1911] 1 K. B. 19; *Hackney*

*Furnishing Co. v. Watts* [1912] 3 K. B. 225.

(g) Railway Rolling Stock Protection Act, 1872 (35 & 36 Vict. c. 50), s. 3.

(h) Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), s. 18. Protection extends to a gas stove (*Gas Light Co. v. Hardy* (1886) 17 Q. B. D. 619).

(i) Waterworks Clauses Act, 1863 (26 & 27 Vict. c. 93), s. 14.

(k) Electric Lighting Act, 1882 (45 & 46 Vict. c. 56), s. 25.

manufactures, are also absolutely protected from seizure under distress for rent (*a*).

The following things are exempted at common law or by statute from seizure if there are other distrainable chattels on the premises sufficient to satisfy the landlord's claim, but not otherwise :—

(*a*) Beasts of the plough (*b*), sheep (*c*), and instruments of husbandry.

(*b*) Tools and implements of trade (*d*).

(*c*) Growing crops seized or sold under a writ of execution are liable, so long as they remain on the tenant's land, to be distrained, but only for rent accruing due after the seizure or sale (*e*).

(*d*) Under the Agricultural Holdings Act, 1908 (*f*), re-enacting in this respect the Agricultural Holdings Act, 1883, live stock of a third party brought on to an agricultural holding to be 'agisted,' or fed, at a fair price in money or kind (*g*), may, if there is no other sufficient distress, be distrained, but only for the amount of the price then remaining due for agistment. The owner of the stock may, at any time before it is sold, redeem it, by paying to the distrainor the sum so due.

(*e*) Finally, the National Insurance Act, 1911 (*h*), affords to insured persons in receipt of sickness benefit a temporary protection from distress during a limited time, upon the registration of a certificate signed by the medical practitioner in

(*a*) Hosiery Act, 1843 (6 & 7 Vict. c. 40), ss. 18, 19.

(*b*) Statute of Marlborough (1267) c. 4; *Piggott v. Birtles* (1836) 1 M. & W. 441.

(*c*) *Keen v. Priest* (1859) 4 H. & N. 236.

(*d*) But see *Lavell v. Ritchings* [1906] 1 K. B. 480, and the absolute privilege given by the Law of Distress Amendment Act,

1888, s. 4.

(*e*) Landlord and Tenant Act, 1851, s. 2.

(*f*) S. 29; *London and Yorkshire Bank v. Belton* (1885) 15 Q. B. D. 457; *Masters v. Green* (1888) 20 Q. B. D. 807.

(*g*) *London and Yorkshire Bank v. Belton*, *ubi sup.*

(*h*) S. 68. (See *ante*, pp. 281–282.)

attendance to the effect that the levying of a distress would endanger the life of the insured person.

To the rule that no goods can be taken in distress which are not on the premises out of which the rent issues, an important exception was introduced by the Distress for Rent Act, 1737, to protect the landlord from being deprived of his remedy by the tenant fraudulently removing his goods to other premises to avoid distress. The statute enables the landlord to follow the goods and seize them wherever he can find them within thirty days after their removal; provided that the goods belonged to the tenant at the time of their removal, and were removed with the fraudulent intention of depriving the landlord of his remedy (a). But this right cannot be exercised if the goods have, since the date of their removal, been sold to a *bonâ fide* purchaser.

The Act of 1737 does not give the landlord any remedy where goods belonging to a third person—as, for example, under a bill of sale—are removed from the tenant's premises to avoid a threatened distress (b); or where the tenant, when his goods are distrained, is no longer in possession of the demised premises (c). But, where the right can be exercised, any building in which it is suspected that the goods are concealed, may, with the assistance of a constable, be broken into in the day-time; though, if it is a dwelling-house, oath must first be made before a justice of the peace of reasonable grounds for the suspicion. The landlord is entitled under the statute (d) to recover by action of debt from the tenant, or any other person who assists in the fraudulent removal or concealment of the goods, a penalty of

(a) Distress for Rent Act, 1737, s. 1. And see *Dibble v. Bowater* (1853) 17 J. P. 792.

(c) *Gray v. Stait* (1883) 11 Q. B. D. 668.

(b) *Tomlinson v. Consolidated Corporation* (1890) 24 Q. B. D.

(d) S. 3; *Miller v. Green* (1831) 8 Bing. 92; *Hobbs v. Hudson* (1890) 25 Q. B. D. 232.

double their value; or, if their value does not exceed 50*l.*, he may recover the penalty by proceedings in a court of summary jurisdiction (a).

A distress can only be levied by the person to whom the rent is due, or by his duly authorised bailiff. No person may act as bailiff, to levy a distress, unless authorised by a certificate in writing of a county court judge or registrar (b). Thus, the managing director of a company cannot, unless he is a duly certificated bailiff, lawfully distrain for rent due to the company (c). It is the usual and more prudent course to employ a bailiff; and it is also usual, but not necessary, for the bailiff to have an authority in writing, called a *distress warrant* (d), from the person employing him, authorising him to distrain on certain specified premises for the specified amount of rent due, and the costs of the distress.

The first step in levying a distress is, to enter on the premises out of which the rent issues. The entry must be made in the daytime (*i.e.* after sunrise and before sunset) and peaceably; though any means of entry which are not forcible may be used (e). The outer door must not be broken (f); nor must entry be made by

(a) Distress for Rent Act, 1737, s. 4; *Coster v. Wilson* (1838) 3 M. & W. 411.

(b) Law of Distress Amendment Acts, 1888, s. 7, and 1895, s. 2; *Perring v. Emerson* [1906] 1 K. B. 1.

(c) *Hogarth v. Jennings* [1892] 1 Q. B. 907.

(d) A distress warrant indemnifies the bailiff against any damages he may be called upon to pay if the landlord has no right to distrain; but not against the consequences of any irregularity committed by the bailiff in the mode or extent of levying the distress, (See

*Draper v. Thompson* (1829) 4 Car. & P. 84.) A bailiff is liable in damages for negligence resulting in loss to the landlord employing him. (See *Megson v. Mapleson* (1883) 49 L. T. 744; *White v. Heywood* (1888) 5 T. L. R. 115.)

(e) *Crabtree v. Robinson* (1885) 15 Q. B. D. 312. And see *Long v. Clarke* [1894] 1 Q. B. 119, where entry after climbing over an adjoining wall was held to be lawful.

(f) *American Must Co. v. Hendry* (1893) 62 L. J. Q. B. 388.



opening a window (a). After admission into the premises has been obtained in a peaceable manner, the distrainor may be justified in breaking open an inner door or cupboard to find distrainable goods.

After entry, the next step is to *seize* sufficient goods to satisfy the arrears of rent due and the costs of the distress. Physical grasping is not necessary. A touching or other indication of some chattels in the name of all is good as a seizure of all; and it is enough if the distrainor takes any means to express his intention to distrain for rent in arrear, and to prevent, although ineffectually, the removal of the goods from the premises—as, for example, by declaring that the goods must not be removed until the rent is paid.

After seizure, the next step is to *impound* the goods; that is, to put them in the custody of the law. Formerly goods could only be impounded by removing them from the premises, and putting them in a public or private pound. But, under the Distress for Rent Act, 1737, it was made lawful to impound the goods on the premises. No particular act is necessary to constitute an impounding on the premises (b). It is sufficient if an inventory is made of the goods distrained, and served, with notice of the distress, on the tenant. It is not necessary to remove or lock up any of the goods; but they may, with the assent and for the convenience of the tenant, be left in their ordinary position (c). It is usual in those circumstances to leave a man in possession to prevent the removal of the goods from the premises; but this precaution is not legally necessary, as, once the goods are impounded, they are in the custody of the law, and it is unlawful to remove them (d). An action for treble damages for ‘pound breach’ or ‘rescue’ of goods

(a) *Nash v. Lucas* (1867) L. R. 2 Q. B. 590.

(b) *Thomas v. Harris* (1840) 9 1 M. & G. 695,

(c) *Tennant v. Field* (1857) 27 L. J. Q. B. 33.

(d) *Jones v. Biernstein* [1900] 1 Q. B. 100,

distrained is maintainable by a landlord, without proof of any special damage suffered by him (a).

The distrainor must not seize more goods than are reasonably sufficient to satisfy the arrears of rent and costs. An excessive distress is unlawful at common law; and is forbidden by statute (b). The distrainor guilty of an excessive distress is liable to damages for the value of the goods less the rent in arrear, and expenses; or, if the goods have not been sold, for the damage, if any, suffered by the temporary loss of their use (c). But he ought to seize sufficient to cover the amount due; because it is unlawful to distrain twice for the same arrears, even if the first distress was abandoned, unless an honest mistake was made as to the value of the goods (d), or the first distress was illegal (e), or its fruits were lost owing to the tenant's act (f).

After impounding the goods, the next step usually taken is to sell them under powers conferred by statute (g); unless they are *replevied* (h) by the tenant or owner, or the arrears of rent together with the costs of the distress are paid. By the common law, goods distrained could not be sold, but merely detained by the landlord as a pledge or security for the payment of the rent in arrear; and this power the landlord still possesses, and can exercise instead of the statutory power of sale. When a sale of the goods is intended, notice in writing of the

(a) 2 Will. & M. (1689) c. 5, s. 4; Limitation of Actions and Costs Act, 1842 (5 & 6 Vict. c. 97); *Kemp v. Christmas* (1898) 79 L. T. 233.

(b) Statute of Marlborough, 1267 (52 Hen. 3), c. 4; *Tancred v. Leyland* (1851) 16 Q. B. 669; *Glynn v. Thomas* (1856) 11 Ex. 870.

(c) *Wells v. Moody* (1835) 7 Car. & P. 59; *Chandler v. Doulton* (1865) 3 H. & C. 553.

(d) *Hutchins v. Chambers*

(1758) 1 Burr. 579; *Smith v. Goodwin* (1833) 2 L. J. K. B. 192.

(e) *Grunnell v. Welch* [1906] 2 K. B. 555.

(f) *Lee v. Cooke* (1858) 3 H. & N. 203.

(g) 2 W. & M. (1689) c. 5; Landlord and Tenant Acts, 1709, 1730; Distress for Rent Act, 1737; Distress (Costs) Act, 1817; Law of Distress Amendment Act, 1888; Distress for Rent Rules, 1888.

(h) See *post*, pp. 460–461.

distress must be given and served personally on the tenant, or left at some conspicuous place on the premises ; and this is usually done by serving the tenant with a copy of the inventory showing what goods have been seized, and with it a notice specifying the amount of rent in arrear. Before the passing of the Law of Distress Amendment Act, 1888, it was necessary to have the goods *appraised* or valued before sale ; but the Act has dispensed with this necessity, except when the tenant or owner of the goods gives notice in writing requiring the goods to be appraised before sale. Whenever an appraisement is so required, the value of the goods must, before sale, be ascertained by two reasonably competent and disinterested appraisers, at the expense of the tenant or owner of the goods requiring it. The appraisement is usually written on the inventory and signed by the appraisers.

The landlord may sell the goods within a reasonable time after five clear days, or, if so required by written notice from the tenant or owner of the goods, after fifteen clear days from the taking of the distress and giving notice thereof to the tenant. The goods may be sold on or off the premises, and by auction or by private bargain ; but the tenant or owner may, by giving notice in writing, require the goods to be removed at his risk and expense to a public auction room or other place specified in the notice, and there sold. The landlord cannot purchase the goods himself, even if they are sold at public auction (a).

The goods must be sold for the best price obtainable, and the surplus proceeds, if any, after satisfaction of the rent and expenses, paid to the tenant or owner of the goods sold. The costs of distress are regulated by the Distress for Rent Rules, 1888 (b), which provide a table

(a) *Moore, Nettlefold & Co. v. Singer* [1904] 1 K. B. 820.

(b) As to agreement between

bailiff and landlord for extra remuneration, see *Robson v. Biggar* [1907] 1 K. B. 690.

of fees, charges, and expenses, varying according as the amount of rent demanded and due does, or does not, exceed 20*l*. It may be here observed, that an unconditional tender to the landlord or his duly authorised agent of the proper amount of rent due, if made before the entry, determines the right to distrain; but if a tender is made after impounding and before sale, it must include the costs of the distress, properly incurred up to the date of tender.

A distress for rent is *illegal* if no rent is in arrear, or (where the rent distrained for is rent-service) if no tenancy exists, at the time the goods are taken (a); or if the person levying the distress is not the person to whom the rent is payable, nor a certified bailiff; or where a valid tender of the rent due has been made before seizure (b); or if the entry was not made peaceably, or was made at night (c), or on a Sunday; or if the goods seized are privileged from distress; or if a second distress is vexatiously made for arrears of rent previously distrained for.

The remedies for an illegal distress are as follows:—

(a) *Recaption*. The tenant or owner may retake the goods; provided he can do so without committing a breach of the peace or a trespass (d).

(b) *Replevin*. At any time before the goods are sold, the tenant may *replevy* (e) them; by applying to the registrar of the county court of the district in which the goods were taken, for a warrant directing the bailiff of the court to replevy and deliver the goods to the applicant. Before the warrant can be issued, the applicant must give the registrar notice of his intention to replevy, and state in the notice whether he intends to

(a) *Murgatroyd v. Old Silkstone Co.* (1895) 65 L. J. Ch. 111.

(b) *Holland v. Bird* (1833) 10 Bing. 15; *Vertue v. Beasley* (1834) 1 M. & Rob. 21.

(c) *Tutton v. Darke* (1860) 5 H. & N. 647.

(d) *Rich v. Wooley* (1831) 7 Bing. 651. And see *ante*, p. 442.

(e) County Courts Act, 1888, ss. 133–137.

bring his action of replevin in the county court or in the High Court. He must give security by deposit of money or by bond for an amount fixed by the registrar as sufficient to cover the rent alleged to be due, and the probable costs of the action of replevin. The bond or deposit is given to secure performance of the applicant's undertaking to commence his action of replevin within one month if he elects to sue in the county court, or within one week if he elects to bring his action in the High Court, to prosecute the action without delay, and to return the goods to the landlord if so ordered by the judgment in the replevin action. When there is good ground for believing that the title to land exceeding 20*l.* in annual rent or value is in question, or when the amount of the rent alleged to be in arrear, or the value of the goods seized, exceeds 20*l.*, the action may be brought in the High Court; or, if brought in the county court, it may, on application made in chambers in the High Court by the defendant, and on his giving security for a sum not exceeding 150*l.*, be removed by writ of *certiorari* into the High Court.

(c) *Action for damages* for trespass, or conversion, or for wrongful detention of the goods seized. Where a person is guilty of an *illegal*, as distinguished from a merely excessive or irregular distress, he is deemed in law to be a *trespasser ab initio* (a); and his entry on the premises, and every subsequent act done in relation to the distress, are unlawful. The damages recoverable for an illegal seizure and sale of goods are the value of the goods (b); but if the distress has been withdrawn before the removal of the goods, the actual damage only can be recovered (c). But if no rent was in arrear at all, and

(a) See *Attack v. Bramwell* (1863) 3 B. & S. 520; and *Grunnell v. Welch* [1905] 2 K. B. 650; [1906] 2 K. B. 555.

(b) *Keen v. Priest* (1859) 4 H. & N. 236.

(c) *Hogarth v. Jennings* [1892] 1 Q. B. 907.

the goods have been sold, the owner is entitled to recover double their value (a).

(d) *Proceedings in a court of summary jurisdiction* under the provisions of a statute (b); as, for example, a statute enabling the owner of goods privileged by the statute from seizure to obtain a summary order from justices for their delivery up, or for payment of their value, if they have been sold. Under the Metropolis Police Court Act, 1839 (c), magistrates have also power, in cases of wrongful distress upon weekly or monthly tenants, or upon tenants whose rent does not exceed 15*l.* a year, to summon the parties, and adjudicate summarily upon the matter.

When a landlord lawfully enters on his tenant's premises to distrain for rent justly due, but in the course of carrying out the distress he commits any *irregularity*, subsequent to the seizure of the goods, it is provided by the Distress for Rent Act, 1737, that the distress shall not thereby be deemed unlawful, nor the distrainor a trespasser *ab initio* (d); but the tenant or other party aggrieved by the irregularity may, if he has suffered special damage (e), recover damages, unless a proper tender of amends has been made before action brought (f). Thus, if the landlord sells the goods prematurely, or without notice, or without appraisement (after being duly served with notice to appraise), he is guilty of an irregular but not an illegal distress, and is only liable for the actual damage caused by the irregularity. But the protection given by the Act only applies where the distress was originally lawful; and it does not relieve a person who makes a forcible entry, or

(a) 2 W. & M. (1689) c. 5, s. 5; *Masters v. Farris* (1845) 1 C. B. 715; *Potter v. Bradley* (1894) 10 T. L. R. 445.

(b) See, for example, Law of Distress Amendment Act, 1895, s. 4; Agricultural Holdings Act, 1908, s. 30; Law of Distress Amendment Act, 1908, s. 2.

(c) 2 & 3 Vict. c. 71, s. 39.

(d) S. 19; *Gambrell v. Earl of Falmouth* (1836) 5 A. & E. 403.

(e) *Harvey v. Pocock* (1843) 11 M. & W. 740; *Rodgers v. Parker* (1856) 18 C. B. 112; *Lucas v. Tarleton* (1858) 27 L. J. Ex. 246.

(f) Distress for Rent Act, 1737, s. 20.

seizes privileged goods, or commits more than a mere irregularity, from his common law liabilities (a).

Finally, it should be observed that the right of a landlord to recover rent by action is suspended so long as goods distrained remain in his hands or control unsold (b).

Of much less practical importance than the remedy of distress for rent, is the somewhat analogous remedy of distress *damage feasant*, which entitles a person on whose land the cattle of another trespass and commit damage, either to the freehold or to other animals (c), or the goods of another are unlawfully placed, to seize and impound them, until their owner pays compensation for the damage committed (d). The remedy cannot be exercised if the trespass was due to the injured party's own negligence, *e.g.*, to his failure to repair fences which he ought to have repaired (e); and chattels or animals in actual use may not be seized (f). If the party injured distrain, he cannot, while he holds the distress, also sue for the damage (g).

Owing to the simple and effective character of the remedy by distress, it is in many cases authorised by statute to enforce the payment of duties and penalties imposed by Act of Parliament (h). There is also a right of distress for a neglect to do suit in the lord's court, or to pay amercements legally imposed by a court leet or

(a) *Brown v. Glenn* (1851) 16 Q. B. 254; *Tutton v. Darke* (1860) 29 L. J. Ex. 271. (The point was not, however, expressly discussed.)

(b) *Lehain v. Philpott* (1875) L. R. 10 Ex. 242.

(c) *Boden v. Roscoe* [1894] 1 Q. B. 608.

(d) *Tyrringham's Case* (1585) 4 Co. Rep., at 36 b; *Ambergate Ry. Co. v. Midland Ry. Co.* (1853) 2 E. & B. 793.

(e) *Singleton v. Williamson* (1861) 7 H. & N. 410.

(f) *Field v. Adames* (1840) 12 A. & E. 649.

(g) *Boden v. Roscoe* [1894] 1 Q. B. 608.

(h) For example, for the assessments made by the Commissioners of Sewers (Commission of Sewers Act, 1708; Land Drainage Act, 1861, s. 38); and for poor rates (Poor Relief Acts, 1601 and 1743, s. 7; Poor Law Amendment Act, 1834, s. 99; *In re Elizabeth Allen* [1894] 2 Q. B. 924).

court baron (a); but in these latter cases, and in that of *damage feasant*, there is no right of sale.

(7) *Seizure of heriots*.—Where a person is entitled on the death of a tenant of a freehold estate of inheritance to a heriot-service, he may enforce such right by distress; in much the same way as a landlord can at common law take goods in distress for rent. But for heriot-custom, which is a common incident of copyhold tenure, the lord of the manor, though he may seize the identical thing itself, cannot distrain any other chattel (b).

(8) *Accord and satisfaction*.—When a person, having a claim against another for which he may bring an action, agrees to accept, and does actually receive, something different in satisfaction of such claim, the agreement and the performance of it constitute an *accord and satisfaction*, and extinguish the original claim. As if a man contract to build a house or deliver a horse, and fail in it; this is an injury, for which the sufferer may have his remedy by action. But if the party injured accepts in satisfaction a sum of money, or some other thing than that for which he contracted, this is a redress of that injury, and entirely takes away the action (c).

But it is to be observed, first, that the action will not be taken away by mere accord without satisfaction; unless it was actually agreed that the accord should be accepted (without performance) as satisfaction (d). Thus, in the case supposed, the mere agreement to accept the

(a) Co. Litt. 96; Bro. Abr. in tit. *Distresses*, 15; Scriven, *Copyholds* (7th edn.), pp. 446, 447.

(b) Co. Cop. s. 25; *Odiham v. Smith* (1593) Cro. Eliz. 590; *Major v. Brandwood* (1632) Cro. Car. 260.

(c) *Peytoe's Case* (1612) 9 Rep. 79; *Wallace v. Kelsall* (1840) 7

M. & W. 264; *Thurman v. Wild* (1840) 11 A. & E. 453; *Jones v. Broadhurst* (1850) 9 C. B. 173.

(d) *Evans v. Powis* (1847) 1 Exch. 601; *Hall v. Flockton* (1851) 16 Q. B. 1039; *McManus v. Bark* (1870) L. R. 5 Ex. 65.



sum of money will not, until actual payment of the amount, bar the action on the original agreement to build the house or deliver the horse ; unless this was the actual arrangement between the parties. For this would only be substituting one right of action for another (a). And, second, there must be *consideration* for the agreement, unless, perhaps, it is under seal. Thus, the payment of a smaller sum is no satisfaction of a debt for a larger amount ; e.g., if a man owe 100*l.*, an agreement between him and his creditor that he shall pay 50*l.* in satisfaction, will not, though the latter sum be actually paid, suffice in law to bar the action on the original debt. But if the creditor or claimant accepts payment or delivery of something of a different nature from that to which he was entitled, there is sufficient consideration to support the agreement ; although what he accepts in satisfaction may be of less value than that to which he was originally entitled. For example, the acceptance of a cheque or other negotiable instrument may constitute a valid discharge of a debt due in money for a larger amount than that paid by the cheque ; if it was accepted by the creditor in satisfaction of his claim (b).

(9) *Arbitration*.—Any dispute in any matter affecting the civil rights of the parties to it may be referred by them to the decision of an arbitrator or umpire. An agreement by which persons refer existing or future differences to arbitration is called a ‘ submission ’ ; and the decision of the arbitrator or umpire is called an ‘ award.’ Every person capable of making a contract may enter into a binding submission to arbitration. The submission may be verbal ; but is usually made in

(a) *Edwards v. Hancher* (1875) 1 C. P. D. 111.

(b) *Pinnel's Case* (1601) 5 Rep. 117 a ; *Cumber v. Wane* (1719) 1 Stra. 425 ; *Sibree v. Tripp* (1846) 15 M. & W. 23 ; *Goddard v. O'Brien* (1882) 9 Q. B. D. 37 ;

*Foakes v. Beer* (1884) L. R. 9 App. Ca. 605 ; *Bidder v. Bridges* (1887) 37 Ch. D. 406 ; *Day v. McLea* (1889) 22 Q. B. D. 610 ; *Nathan v. Ogdens, Limited* (1905) 21 T. L. R. 775.

writing. When the submission is in writing, the provisions of the Arbitration Act, 1889 (*a*), apply; unless a contrary intention is expressed in the agreement (*b*). We shall therefore consider the effects of a written submission to which the Act applies.

First, as to the *appointment of arbitrators*.—The arbitrator may be named in the submission, or may be left to be appointed at a future time. Many forms of contract in general use contain a clause providing that if any dispute between the parties should arise out of the contract, it shall be referred to arbitration. If no other mode of reference is provided in the submission, the reference is to a single arbitrator. When the parties disagree as to the person to be appointed, or if the person appointed refuses or is unable to act, the court may, on the application of either party, appoint an arbitrator (*c*). Applications to the court under the Act are made, if in the King's Bench Division, by summons before a Master in chambers, except in a few cases (*d*), where they must be made on motion; and, if in the Chancery Division, are made on motion to the Judge in chambers or in court. When an arbitrator is appointed, his authority cannot be revoked by either party, except by leave of the court (*e*). If the submission provides that the reference is to be to two arbitrators, one to be appointed by each party, and one of the parties refuses to appoint his arbitrator, after being served with a seven days' notice by the other party, the party who has already nominated his arbitrator may appoint him to act as sole arbitrator; and that arbitrator's award will be binding on both parties, as if he had been appointed by consent (*f*). Where two arbitrators are appointed, they may appoint an umpire, or, if they do not appoint

(*a*) 52 & 53 Vict. c. 49.

(*b*) *Ibid.* s. 2.

(*c*) *Ibid.* s. 5.

(*d*) *E.g.* an application to remove an arbitrator for mis-

conduct, or to set aside an award.

(*e*) Act of 1889, s. 1.

(*f*) *Ibid.* s. 6.

an umpire, or he refuses to act, the court may appoint one. Sometimes the submission provides that the reference is to be to three arbitrators, as distinguished from two arbitrators and an umpire. This form of submission is undesirable; because, if the third arbitrator is to be selected by the two to be appointed by the parties, the court has no power, in the event of one of the parties refusing to nominate his arbitrator, to compel him to do so or to make the appointment instead of him (*a*). But the court can indirectly compel him to carry out his agreement to refer, by staying any action he may bring relating to the dispute which he has agreed to refer to arbitration (*b*). Another objection to the form of submission referred to is, that unless the submission provides that the award of two of the arbitrators shall be binding, the award is bad unless signed by the three arbitrators (*c*); which is not likely to be done unless they are unanimous in their decision.

Second, as to the *effect of a submission* on the right to bring an action.—If a party to a submission brings an action against the other party to it, in respect of any matter which they have agreed to refer to arbitration, the defendant may apply to the court for an order to *stay the proceedings* (*d*). The application may be made after the defendant has entered an appearance; but must be made before he takes any other step in the action, as, for example, by applying to the court for an order that the plaintiff give security for costs (*e*), or for discovery (*f*), or for leave to deliver a defence or to administer interrogatories, or by acquiescing without objection in an order made on the plaintiff's summons for directions (*g*).

(*a*) *Re Smith and Nelson* (1890)  
25 Q. B. D. 545.

(*b*) *Manchester Ship Canal v.*  
*Pearson* [1900] 2 Q. B. 606.

(*c*) *United Kingdom Insurance*  
*Co. v. Houston* [1896] 1 Q. B.  
567.

(*d*) Act of 1889, s. 4.

(*e*) *Adams v. Catley* (1892) 66  
L. T. 687.

(*f*) *Chappell v. North* [1891] 2  
Q. B. 252.

(*g*) *County Theatre, Ltd. v.*  
*Knowles* [1902] 1 K. B. 480;

But negotiations or correspondence between the parties or their solicitors, with reference to the action, do not constitute steps in the proceedings; so as to bar an application to stay (a). In support of the application, the defendant must show by affidavit that the action relates to a dispute which falls within the terms of the submission, and that he was, and is still, willing to do all things necessary to the proper conduct of the arbitration. The defendant is *prima facie* entitled to have the action stayed (b); unless the plaintiff can satisfy the Master or the Judge that the matters in dispute ought not to be decided by arbitration. The court has a discretionary power (c) to refuse to grant a stay; and has refused a stay where the only question in the case was one of law (d), or was more suitable for decision by the court than by an arbitrator (e), or where there was a charge of fraud against the plaintiff which he desired to be investigated and disposed of in open court (f), or where the arbitrator agreed upon had a secret interest in the case, or was otherwise an unfit person to act as arbitrator between the parties (g).

Third, as to the powers of the arbitrator in conducting

*Richardson v. Le Maître* [1903] 2 Ch. 222; *Ochs v. Ochs Brothers* [1909] 2 Ch. 121.

(a) *Brighton Marine Co. v. Woodhouse* [1893] 2 Ch. 486; *Ives v. Willans* [1894] 1 Ch. 68, 2 Ch. 478; *Bartlett v. Fords Hotel Co.* [1895] 1 Q. B. 850, [1896] A. C. 1.

(b) *Hodgson v. Railway Passengers Assurance Co.* (1882) 9 Q. B. D. 188; *Parry v. Liverpool Malt Co.* [1900] 1 Q. B. 339; *Austrian Lloyd Co. v. Gresham Assurance Society* [1903] 1 K. B. 249. And see *Willesford v. Watson* (1873) L. R. 8 Ch. App., at p. 480; *Doleman & Sons v. Ossett Corporation* [1912] W. N. 215.

(c) *Vawdrey v. Simpson* [1896] 1 Ch. 166.

(d) *Re Carlisle* (1890) 44 Ch. D. 200.

(e) *Barnes v. Youngs* [1898] 1 Ch. 414.

(f) *Russell v. Russell* (1880) 14 Ch. D. 471.

(g) *Nuttall v. Mayor of Manchester* (1891) 8 T. L. R. 513; *Re Frankenberg* (1894) 10 T. L. R. 393; *The City of Calcutta* (1899) 79 L. T. 517; *Freeman & Sons v. Chester R. D. C.* [1911] 1 K. B. 783, C. A.; *Aird (J.) & Co. v. Bristol Corporation* [1912] 28 T. L. R. 278. But see *Eckersley v. Mersey Docks* [1894] 2 Q. B. 667.

the reference.—He may examine the parties to the reference, and witnesses, on oath or affirmation, and compel the production of documents in their possession relating to the matters in dispute. Witnesses may be summoned by *subpœna* to give evidence or produce documents (a). If any question of law arises in the course of the reference, the arbitrator may, on his own initiative or at the request of either party, state such question of law in the form of a *case* for the opinion of the court (b), and delay making his award until the court has decided the question of law submitted. If the arbitrator refuses, at the reasonable request of either party, to state a case, he may be compelled to do so by order of the court (c). The application to the court must be made before the arbitrator makes his award (d); and it may be made before he has indicated his opinion on the point of law raised (e). If the arbitrator, after refusing without reasonable grounds to state a case, or to adjourn the reference pending an application to the court, makes his award before such application can be made, the court may set the award aside on the ground of the arbitrator's misconduct (f). There is no appeal from the decision of the court on the question of law stated for its opinion (g).

Fourth, as to *making the award*.—The arbitrator must make his award in writing; and, in the absence of any term in the submission to the contrary, within three months after entering on the reference. But the time for making the award may be enlarged by any writing signed by the arbitrator; or by order of the court, if the

(a) *In re Enoch and Zaretsk* [1897] 1 Q. B. 312; *Re Nuttall Bock & Co.'s Arbitration* [1910] 1 K. B. 327. (1899) 82 L. T. 17.

(b) Act of 1889, s. 19.

(c) *Ibid.*

(d) *Tabernacle Building Society v. Knight* [1892] A. C. 298; *Re Montgomery* (1898) 78 L. T. 406.

(e) *Re Spillers and Baker*

(f) *Re Palmer and Hosken* [1898] 1 Q. B. 131.

(g) *Re Knight and Tabernacle Building Society* [1892] 2 Q. B. 613; *British Westinghouse, etc., Co. v. Underground Electric Railways* [1912] A. C. 673.

time for making the award has already expired (*a*). Unless the submission expresses a contrary intention, the arbitrator may, in his award, deal with the question of the costs of the reference and the award, according to his discretion; and may direct to and by whom, and in what proportion, the costs are to be paid, and may tax or settle the amount to be paid, and may even award costs to be paid as between solicitor and client (*b*). An arbitrator is usually entitled to be remunerated for his services, even if there is no express agreement to pay his fees; and he can maintain an action for them. He has also a lien on the award for the amount of his fees; and, in practice, usually retains possession of the award until they are paid (*c*).

An arbitrator, after making his award, has power to correct any clerical error arising from any accidental slip or omission (*d*); but cannot make any material alteration in his finding, unless the award is remitted by the court to him for reconsideration (*e*). If the rights of the parties depend on questions of law, the arbitrator has power to state his award in the form of a special case for the opinion of the court (*f*). If he adopts this course, he ought to set out in the award all the material facts found by him, and leave the court to determine on those facts the respective rights of the parties. On stating his award in the form of a special case, the arbitrator exhausts his powers, and becomes *functus officio*; unless his powers are revived by the court sending back the award to him for reconsideration. An appeal lies from the decision of the court on an award stated in the form of a special case (*g*).

Fifth, as to *setting aside or remitting an award*.—The

(*a*) Act of 1889, Sched. I. (*c*)  
and s. 9.

(*b*) *Ibid.* Sched. I. (*i*).

(*c*) *Willis v. Wakeley* (1891) 7  
T. L. R. 604; *Brown v. Llan-*  
*doverly Terra Cotta Co.* (1909) 25  
T. L. R. 625.

(*d*) Act of 1889, s. 7 (*c*).

(*e*) *Re Stringer and Riley*  
[1901] 1 K. B. 105.

(*f*) Act of 1889, s. 7 (*b*).

(*g*) *Re Kirkleatham Local*  
*Board* [1893] 1 Q. B. 375.

court may set an award aside where the arbitrator or umpire has been guilty of misconduct, or the award has been improperly procured (*a*), or is bad in point of law on the face of it (*b*). But, instead of setting it aside, the court has a discretionary power to remit it to the arbitrator for reconsideration and amendment (*c*). An application to set aside an award is made in the King's Bench Division by notice of motion (*d*) to the Divisional Court, and must be made without delay (*e*).

Sixth, as to *enforcing an award*.—An award is *prima facie* final and binding on the parties to the submission and the persons claiming under them. It may, by leave of the court, be enforced in the same manner as a judgment or order to the same effect (*f*). The application is made in the King's Bench Division or in the Chancery Division by *originating summons*, and is generally granted; unless there is a doubt as to the validity of the award. If it is granted, the award can be enforced by any of the modes of execution appropriate to a judgment to the same effect; or an action may be brought upon it (*g*). If leave to enforce it as a judgment is not given, the party in whose favour the award is made may bring an action on it.

(10) The right of *retainer* arises where a debtor make his creditor executor of his will, or where the creditor obtains letters of administration to his debtor. In either of these cases, the law gives the personal representative a

(*a*) Act of 1889, s. 11; *Blanchard v. Sun Fire Office* (1890) 6 T. L. R. 365; *Re Gregson and Armstrong* (1894) 70 L. T. 106; *Re Palmer and Hosken* [1898] 1 Q. B. 131; *Landauer v. Asser* 1905] 2 K. B. 184; *Jungheim & Co. v. Foukelmann* [1909] 2 K. B. 948.

(*b*) *Landauer v. Asser, ubi sup.*; *Re North Western Rubber Co. and Huttenbach & Co. Arbitration* [1908] 2 K. B. 907; *Ex parte*

*Strabane R. D. C.* [1910] 1 I. R. 135; *In re King and Duveen* [1913] 2 K. B. 32.

(*c*) Act of 1889, s. 10. And see *Re Stringer and Riley* [1901] 1 K. B. 105.

(*d*) Ord. LII. rr. 1, 2, and 4.

(*e*) Ord. LXIV. r. 14.

(*f*) Act of 1889, s. 12.

(*g*) *China Steam Navigation Co. v. Van Laun* (1905) 22 T. L. R. 26.

remedy for his debt, by allowing him to *retain* out of the legal assets in his possession so much as will pay himself before paying any debt of the same degree due to another creditor; though in practice it would seem that the creditor administrator, who obtains administration in that capacity, is deprived of this right by the present form of his bond, which requires him to pay all the debts of the deceased “rateably and proportionably and according to the priority required by law, not, however, preferring his own debt or the debt of any other person by reason of his being administrator as aforesaid” (a). The nature of this right has been previously discussed at length (b).

[ (11) *Remitter* was where he who had the property in land, but was out of possession, and had no right to enter on the land without recovering possession by real action, obtained afterwards the possession of the lands by some subsequent defective title; in which case he was remitted or sent back, by operation of law, to his antient and more certain or perfect title (c). But this remedy is of little or no practical importance since the abolition of real actions, and the introduction of the present procedure for the recovery of land.]

(a) In *Davies v. Parry* [1899] 1 Ch. 602, and *Re Belham* [1901] 2 Ch. 52, the bonds before the Court in these cases contained the words “not *unduly* preferring his own debt”; and it was held that these words did not operate to deprive the creditor of his right of retainer. (See

Tristram and Coote, *Probate Practice* (14th ed.), p. 75.)

(b) See *ante*, vol. ii., pp. 333–334.

(c) Litt. ss. 659, 693, 695; Co. Litt. 363 b; Gilb. *Ten.* 129; 1 Sand. *Uses*, 166; *Doe v. Woodroffe* (1842) 10 M. & W. 608; 15 *ib.* 769.



## CHAPTER VIII.

## OF THE REMEDY BY ACTION GENERALLY.

HAVING thus briefly described the extra-judicial remedies open to a person who has suffered a civil injury, we shall now proceed to the consideration of the remedies by action for redressing civil injuries.

An action now means a civil proceeding commenced by a writ of summons indorsed with a statement of the nature of the claim made, or the relief or remedy sought, or by an originating summons (a). There are, however, many proceedings which may be instituted in the High Court which are not actions. For example, proceedings in the Divorce Division are commenced by *petition*, bankruptcy proceedings in the King's Bench Division, and applications in the Chancery Division under the Companies (Consolidation) Act, 1908, for the winding up of companies, or under the Trustee Act, 1893, are also commenced by *petition*. Many applications, not necessarily in any pending action, are made on *motion*; as, for example, an application to set aside an arbitrator's award on the ground of misconduct, an application for a writ of *mandamus*, or an application to strike a solicitor off the rolls. The decision of the court on a question of law may, as we have seen (b), be sought in the form of a *special case* for the opinion of the court, stated by an arbitrator or the judge of an inferior court, for his guidance in dealing with a matter before him.

Before the Judicature Act, 1873, actions in the courts

(a) Judicature Act, 1873, s. 100.

(b) See *ante*, p. 470.

of common law (a) were, as has been said (b), classified as actions on contract and actions of tort. These were all *personal actions*, i.e. actions based upon the defendant's personal liability to do some act or suffer some liability; the old *real actions*, which sought the recovery of some specific piece of land, having been almost entirely swept away by the Real Property Limitation Act, 1833, and completely by the Common Law Procedure Act, 1860. Since 1875, when the Judicature Act, 1873, took effect, an action to recover land, though still often called an 'action of ejectment,' has been commenced, like an ordinary action, by writ of summons (c).

Of personal actions there were eight forms: viz., debt, covenant, assumpsit, trespass, trover, detinue, replevin, and trespass on the case. The first three were founded on contract (d); and the remaining five on tort.

(1) An action of *debt* lay to recover a certain sum of money alleged to be due from the defendant to the plaintiff; (2) of *covenant*, to recover damages for breach of a contract under seal; (3) of *assumpsit*, to recover damages for breach of a contract (or, as it was more technically called, a 'special promise') not under seal. (4) An action of *trespass* lay to recover damages for any disturbance or violation of the plaintiff's possession of land or goods, or for any direct and forcible injury to his person; (5) of *detinue*, to recover possession of any chattel wrongfully detained, or its value, if the defendant could or would not restore it to the plaintiff (e); (6) of *trover* or

(a) There were no actions in Courts of Equity. The corresponding proceedings there were known as *suits*; and they were not technically classified, though it was common to speak of a "suit for specific performance," an "administration suit," etc.

(b) See *ante*, p. 311.

(c) Ord. I., r. 1.

(d) The action of assumpsit,

which was really only a variety of trespass on the case, was, like all actions of trespass, originally founded on an alleged tort. But it had for long been treated as substantially an action of contract.—E. J.

(e) The action of *detinue*, though founded on a *tort*—viz., the wrongful detainer of a chattel (see *Gledstane v. Hewitt* (1831))

*conversion*, to recover the value of goods as damages from any other person who had got possession of them and converted them to his own use; (7) of *replevin*, to recover damages for unlawful distress levied on the plaintiff's goods or cattle (*a*); and (8) of *trespass on the case* (*b*), which was the general remedy, in cases not falling within any of the other forms, for personal wrongs and injuries without force. The plaintiff had to be careful to select the proper form of action; because if he chose the wrong one, he would be non-suited and have to pay the defendant's costs, even though he had on the facts a good cause of action. The Common Law Procedure Act, 1852, however, introduced, in place of these forms of action, simple statements of the cause of action relied on; and, since the Judicature Act, 1873, all of the above-mentioned kinds of action are commenced in the same way, by a writ of summons indorsed with a statement of the nature of the claim made or the relief or remedy sought. And it is no longer necessary to state in what form the plaintiff is suing. The material facts relied on are stated in the pleadings delivered after the issue of the writ; and, on the facts as alleged and proved, the court will, as a rule, give the plaintiff whatever relief or remedy he is entitled to, irrespective of the form in which he may have brought his action.

Thus it will be seen that, so far as the form of proceedings is concerned, a knowledge of the old varieties of action is not now material. With regard, however, to the substance of the rights of the parties, the old pleadings are of importance; for it is by a careful study of them that an exact knowledge of the nature and extent of the wrong complained of, and the remedies therefor,

1 Cr. & J. 565),—was considered for some purposes as an action on contract. (See *Bryant v. Herbert* (1878) 3 C. P. D. 389.)

(*a*) It lies, however, in other cases also of goods unlawfully

taken. (*George v. Chambers* (1843) 11 M. & W. 149; *Mellor v. Leather* (1853) 1 El. & Bl. 619.)

(*b*) *Scott v. Shepherd* (1772) 2 W. Bl. 892; *Gilbertson v. Richardson* (1848) 5 C. B. 502.

is often best obtained. For, as has been said before, the Judicature Acts, though they have profoundly changed legal procedure, were not intended to change (except in certain specified instances), and have not changed, the substantial rights of the parties. Thus, for example, if we wish to know exactly what constitutes the tort of trespass, and who may bring an action of trespass, and against whom such an action can be brought, we can hardly do better than look up the old precedents of pleading in such cases. There the law of the subject will be found expressed with accuracy and precision.

Actions used also to be classed as *local* or *transitory*; the former being founded on such causes of action as necessarily refer to some particular locality, as in the case of trespass to land, the latter on such causes of action as may take place anywhere, as in the case of trespass to goods, debt, and the like. Thus, all real actions were local; and most personal actions were transitory. Local actions had formerly, as the general rule, to be tried in the county where the cause of action arose, and by a jury of that county; while the transitory actions might be tried in any county. The place and mode of trial of an action are, however, now fixed in every case by an order made by the Master in chambers on a summons for directions. The High Court has jurisdiction over the whole of England and Wales; and may, as a rule, entertain any action on contract or tort wherever the cause of action arose, and whether either or both of the parties to it are British subjects or not, or reside or carry on business in England or Wales or not. The only limitations to its jurisdiction are, first, that no action can be brought in the High Court for the recovery of, or trespass to, land outside England or Wales (a); second, that no writ can be issued for service outside of England or Wales except by leave, and leave can only be obtained

(a) *British South Africa Co. v. Companhia de Moçambique* [1893] A. C. 602.

in the cases specified in Order XI. (a); third, that no action can be successfully brought in the High Court for a tort committed abroad, unless the act complained of was unlawful according to the law both of the place where it was committed and of England (b); and fourth, that an undergraduate resident within the University of Oxford or Cambridge must be sued in the University Court (c).

Where a tort consists of an unlawful act amounting to a *felony*, it is said that the policy of the law will not allow the person injured to pursue his civil remedy by action, if he has failed in his duty of prosecuting the offender for the crime; but although this appears to be the rule, it is doubtful whether it can be enforced, because the offender cannot, if sued, set up his crime as a defence to the action, and the court will (*semble*) not now raise the point (d).

The right to sue or the liability to be sued may be affected by death, bankruptcy, or by express assignment. On the death of one of the parties to a contract which has been broken in their lifetime, the right to sue or the liability to be sued, which accrued at the date of the breach, generally passes on his death to his personal representatives (e). When at the time of the death of one of the contracting parties the contract is still executory, that is to say, the time for performance or complete performance

(a) See *In re Eager* (1882) 22 Ch. D. 86.

(b) *Mostyn v. Fabrigas* (1774) 1 Cowp. 161; 1 Sm. L. C. 591; *The Halley* (1868) L. R. 2 P. C. 193, 204; *Phillips v. Eyre* (1869) L. R. 4 Q. B. 225; 6 Q. B. 1; *Machado v. Fontes* [1897] 2 Q. B. 231; *Carr v. Francis Times & Co.* [1902] A. C. 176.

(c) As to this, see *post*, pp. 693–694, *Ginnett v. Whittingham* (1885) 16 Q. B. D. 761.

(d) *Crosby v. Leng* (1810) 12 East, 409; *White v. Spettigue*

(1845) 13 M. & W. 603; *Wellock v. Constantine* (1863) 2 H. & C. 146; *Wells v. Abrahams* (1872) L. R. 7 Q. B. 554; *Osborn v. Gillett* (1873) L. R. 8 Exch. 88; *Ex parte Turquand* (1878) 9 Ch. D. 704; *Ex parte Ball* (1879) 10 Ch. D. 667; *Vernon v. Watson* [1891] 2 Q. B. 288, *per* Lord HALSBURY.

(e) *Stubbs v. Holywell Rail. Co.* (1867) L. R. 2 Exch. 311; *Bradshaw v. L. & Y. Rail. Co.* (1875) L. R. 10 C. P. 189.

has not arrived, the right or liability of the personal representatives to have the contract carried out depends on the nature of the contract. If the contract entered into by the deceased was of a purely personal nature, such as a contract to marry (a) or to render personal services, the contract is extinguished by his death; and his personal representatives cannot be required to perform it, nor can they demand performance of it by the surviving party. When the contract is not of a personal nature, but is, *e.g.*, a contract to pay money, the benefit of the contract passes, on the death of the creditor or promisee, to his representatives; and, similarly, the duty to perform it passes, on the death of the debtor or promisor, to his representatives, as in the case first put.

When a tort has been committed, and the wrongdoer or the injured person subsequently dies, before the right of action is discharged by payment in satisfaction, or by judgment in an action commenced by the injured person, the right to sue or continue the action, or the liability to be sued, does not at common law pass to the personal representatives of the deceased. The rule is expressed in the maxim: *actio personalis moritur cum persona*, which means, that the right of action is extinguished by the death before judgment of either the wrongdoer or the person injured (b). To this rule of the common law, however, such wide exceptions have been introduced by statute, that the rule has now almost become the exception. Thus, by statute an action may be brought by the personal representatives of a deceased person for any injury to his personal estate, or (within one year after his decease) for any injury to his real estate committed within six months before his death (c); and an action may

(a) *Chamberlain v. Williamson* (1814) 2 M. & S. 408; *Finlay v. Chirney* (1887) 20 Q. B. D. 494.

(b) It will be observed that, in form, this maxim would apply

equally well to actions on contract. It is well established, however, that, save as above specified, it does not.

(c) 4 Edw. 3 (1330) c. 7; 25

be brought against the personal representatives of a deceased wrongdoer, within six months after their appointment, for any injury to real or personal property committed by the deceased within six months before his death (a). And there are other cases (b). The common law rule still applies to the right of action for libel, slander, assault or battery, false imprisonment, seduction, or malicious prosecution, which will therefore become extinguished by the death of either the wrongdoer or the person injured (c); and if, while both are living, an action is brought, and either of them dies before judgment is obtained, the action must abate, and cannot be continued by or against the personal representatives of the deceased party. On the other hand, when the right of action is not extinguished by death, and either party dies before judgment, the action may be continued by or against his representatives (d).

It may also be observed here that the death of a person, while extinguishing his right of action, may, by statute, give rise to a new right of action in his personal representatives or dependants. Thus, under Lord Campbell's Act, 1846 (e), if any person is killed owing to the negligence of another, an action may be brought within one year of his death on behalf of or by his dependants (f), to recover damages to compensate them for the pecuniary loss which they have sustained by reason of his death. Similarly, an action may be brought under the Employers' Liability Act, 1880, on behalf of or by the dependants of

Edw. 3 (1350) c. 5; Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 2.

(a) Civil Procedure Act, 1833, s. 2; *Kirk v. Todd* (1882) 21 Ch. D. 484; *Oakey v. Dalton* (1887) 35 Ch. D. 700.

(b) *Phillips v. Homfray* (1883) 24 Ch. D. 439.

(c) See *Hatchard v. Mège* (1887) 18 Q. B. D. 771.

(d) Ord. XVII.

(e) The Fatal Accidents Act, 1846; amended by the Acts of 1864 and 1908.

(f) *Duckworth v. Johnson* (1859) 4 H. & N. 653; *Pym v. G. N. Ry. Co.* (1863) 4 B. & S. 396; *Bulmer v. Bulmer* (1883) 25 Ch. D. 409; *The Bernina* (1887) 12 P. D. 58; L. R. 13 App. Ca. 1.

a workman who in the course of his employment has met with an injury, which, if it had not resulted in his death, would have entitled him to maintain an action for damages under the Act against his employer. But it should be noted that the right of action given by the above-mentioned Acts is extinguished by the death of the wrongdoer or employer, and does not survive against his personal representatives (a). The dependants of a person to whom the Workmen's Compensation Act, 1906, applies, and who has met with an accident arising out of and in the course of his employment and resulting in his death, have an independent right to recover compensation under the Act from the employer, or, after his death, from his personal representatives (b).

On the bankruptcy of a party to a contract, the right to sue for a breach of it passes to his trustee as part of the assets of the bankrupt divisible amongst his creditors; unless the breach is of a purely personal contract concerning the feelings of the bankrupt, such as a contract to cure or to marry (c). Where a contract for personal services is broken before bankruptcy, the right of action passes to the trustee; but where the breach occurs during the bankruptcy, the bankrupt is entitled to sue in respect of it, even though the contract was made before his bankruptcy (d). When the party who breaks the contract becomes bankrupt, the other party may prove in the bankruptcy for debt or unliquidated damages (e); and where any part of the bankrupt's property consists of unprofitable contracts, the trustee may, within twelve months after his appointment, 'disclaim' them in writing. The disclaimer releases the bankrupt and the trustee from liability on the contracts; but the other contracting

(a) *Gillett v. Firbank* (1887) 3  
T. L. R. 618.

(b) 6 Edw. 7 (1906) c. 58, s. 13.

(c) *Beckham v. Drake* (1849) 2  
H. L. C. 579.

(d) *Bailey v. Thurston, Limited*  
[1903] 1 K. B. 137.

(e) Bankruptcy Act, 1883, s.  
37 (1).



parties injured by the disclaimer are deemed to be creditors of the bankrupt to the extent of their injury, and may prove for the same as a debt under the bankruptcy (a).

Where a person injured by a tort becomes bankrupt, his right of action passes to the trustee if, or so far as, the tort has caused damage to the real or personal property of the bankrupt, but remains in the bankrupt if, or so far as, the tort consists of an injury to his person or his reputation, such as assault, false imprisonment, libel, slander, or seduction (b). Where a tort is committed by a person who becomes bankrupt before action brought, the injured person cannot rank as a creditor in the bankruptcy in respect of his claim for unliquidated damages; but he may bring his action, or enforce a judgment obtained during the bankruptcy, after the bankrupt has obtained his discharge (c).

A right of action to recover property or arising out of contract could be assigned at common law by power of attorney authorising the assignee to bring an action in the name of the assignor, or in equity by an assignment made for good consideration and with notice to the debtor. And now, under the Judicature Act, 1873 (d), a right of action for debt or any other claim which was assignable in equity before the Act may be transferred by an absolute assignment in writing signed by the assignor and made with written notice to the debtor, so as to enable the assignee to bring an action in his own name, but subject to any defence which would have been available against the assignor (e). An assignment of a

- (a) Bankruptcy Act, 1883, s. 55. *Holliday* (1882) 20 Ch. D. 780.  
 (d) S. 25 (6); *Tailby v. Official Receiver* (1888) L. R. 13 App. Ca. 523.  
 (b) *Howard v. Crowther* (1841) 8 M. & W. 601; *Beckham v. Drake* (1849) 2 H. L. C. 579; *Stanton v. Collier* (1854) 23 L. J. Q. B. at p. 120; *Rose v. Buckett* [1901] 2 K. B. 449.  
 (e) *Comfort v. Betts* [1891] 1 Q. B. 737; *Tolhurst v. Associated Portland Cement* [1903] A. C. 414; *Fitzroy v. Cave* [1905] 2 K. B. 364.  
 (c) See Bankruptcy Act, 1883, s. 30 (2), and s. 37; *Watson v.*

right of action to recover damages for a tort is, probably, bad, as being tainted by champerty or maintenance (a). But an assignment of a bare right to recover damages for a tort is good, if made by a trustee in bankruptcy as a means of realising the assets of the bankrupt (b). It is not clear whether part only of a debt or legal chose in action can be validly assigned; though it would seem that the assignee of a portion of a judgment debt cannot issue execution thereon (c).

(a) *May v. Lane* (1894) 64 L. J. (Q. B.) 236; *Dawson v. Great Northern & City Railway* [1905] 1 K. B. 260; *Defries v. Milne* [1913] 1 Ch. 98. (But see *King v. Victoria Insurance Co.* [1896] A. C. 250, which is not, however, binding on English courts.)

(b) *Seear v. Lawson* (1880) 15 Ch. D. 426; *Guy v. Churchill* (1888) 40 Ch. D. 481.

(c) *Skipper v. Holloway* [1909] 2 K. B. 630; [1910] 2 K. B. 635 n; *Forster v. Baker* [1910] 2 K. B. 636.

## CHAPTER IX.

## OF THE LIMITATION OF ACTIONS.

THE Statutes of Limitation and certain special statutes [fix the time within which an action must be brought after the right of action has first accrued } and it will be convenient to consider first those which are applicable to the recovery of land ; second, those which are applicable to the recovery of money charged on land or secured by judgments, and of legacies ; thirdly, that applicable to the recovery of money secured by specialty, and of the personal estate of an intestate ; fourthly, those applicable to the recovery of simple contract debts and to certain other personal actions ; and, fifthly, those applicable to trustees.

I. *The Statutes of Limitation as applicable to land.*—These are the Real Property Limitation Acts, 1833, 1837, and 1874 (a) ; by force of which the law on the subject is now as follows. No action to recover any land or rent (b) can, in general, be brought (otherwise than by the Crown), more than twelve years after the time at which the right

(a) 3 & 4 Will. 4, c. 27 ; 7 Will. 4 and 1 Vict. c. 28 ; 37 & 38 Vict. c. 57. (The last-named statute, though passed in 1874, did not take effect until 1st January, 1879. The main change introduced by it was the substitution of the period of twelve years for that of twenty provided by the Act of 1833.)

(b) 'Rent' for this purpose includes all services and suits for

which a distress may be made, and all annuities and periodical sums of money charged on land, other than moduses or compositions belonging to a spiritual or eleemosynary corporation sole (*Irish Land Commission v. Grant* (1884) L. R. 10 App. Ca. 14 ; *Skene v. Cook* [1902] 1 K. B. 682), but does not include rent reserved under a lease.

to bring the action first accrued to the person bringing the same (a). But if, when the right of any person first accrued, he was under the disability of infancy, or lunacy (b), then he, or the person claiming through him, may bring the action within six years next after the person to whom the right accrued shall have died, or ceased to be under disability (whichever of these events shall first happen), or within twelve years from the accrual of the right, whichever period shall be longest (c). No such action, however, may be brought, except within thirty years next after the right accrued; even though the disability may have attached during the whole of the thirty years, or although the term of six years above mentioned has not expired (d).

The Acts provide that the right to bring the action shall be deemed to have first accrued as follows:—in the case of a person who has been in possession, on his dispossession (e); in the case of an heir or devisee entitled to the possession, on the death of his testator or ancestor who has died in possession; in the case of a grantee by deed of a present interest, on the execution of the deed (f); in the case of remaindermen and reversioners, and persons entitled to other future estates, on their remainders, reversions, or other future estates falling into possession (g); and, in the case of persons becoming entitled to possession by reason of any forfeiture or breach of condition, on the occurring of such forfeiture, or on the breach of such condition, or, if the estate is a remainder or reversion, at the time when it would have fallen into possession

(a) R. P. L. Act, 1833, s. 2;  
R. P. L. Act, 1874, s. 1.

(b) Prior to the Act of 1874, s. 4, *absence beyond seas* used also to be a disability. Coverture cannot (since the Married Women's Property Act, 1882) be regarded as a disability. (*Lowe v. Fox* (1885) 15 Q. B. D. 667.)

(c) R. P. L. Act, 1874, s. 3;  
*Borrows v. Ellison* (1871) L. R. 6 Exch. 128.

(d) R. P. L. Act, 1874, s. 5.

(e) *Littledale v. Liverpool College* [1900] 1 Ch. 19.

(f) R. P. L. Act, 1833, s. 3.

(g) *Ibid.*; R. P. L. Act, 1874, s. 2.

if there had been no such forfeiture or breach of condition (a).

But as regards all remainders, reversions, and future estates, expectant on a particular estate (b), the owner of which particular estate has been, and continues to be, dispossessed, the right of entry is wholly barred, either at the expiration of twelve years from the dispossession of the particular estate, or at the expiration of six years from its determination, whichever period is the longer (c). At which time also are barred all titles created subsequently to such dispossession of the particular estate, out of or in the remainders or reversions thereon.

In the case of reversions on tenancies at will, the right of entry is deemed to accrue first on the determination of the will, or (at the latest) on the expiration of one year from the commencement of the tenancy (d); in the case of reversions on tenancies from year to year (not being by lease in writing), at the end of the first year, or (at the latest) on the last payment of rent (e); and in the case of reversions on leases in writing (reserving twenty shillings or more of annual rent), on the expiration of the term, even if no rent has been paid by the tenant in the meantime (f), or, if the rent has been received adversely by a person wrongfully claiming the reversion, at the time when the rent was first so received, unless rent is subsequently paid to the rightful reversioner (g).

(a) R. P. L. Act, 1833, ss. 3, 4. Any estate which precedes a remainder or reversion is a particular estate. The reversion on a lease for years is not a future estate expectant on a particular estate; for it is itself a present estate (*Walter v. Yalden* [1902] 2 K. B. 304).

(b) See note (f) on p. 484.

(c) R. P. L. Act, 1874, s. 2; *Pedder v. Hunt* (1887) 18 Q. B. D. 565; *White v. Earl of Devon* [1896] 2 Ch. 562. There is an

allowance for disabilities similar to that allowed for claiming estates in possession; with the same extreme limit of thirty years from the accrual of the right (R. P. L. Act, 1874, ss. 3, 5).

(d) R. P. L. Act, 1833, s. 7; *Jarman v. Hale* [1899] 1 Q. B. 994.

(e) R. P. L. Act, 1833, s. 8; *White v. Earl of Devon*, *ubi sup.*

(f) *Chadwick v. Broadwood* (1840) 3 Beav., at p. 315.

(g) R. P. L. Act, 1833, s. 9.

As regards tenancies in tail, when the right of action of a tenant in tail is barred, all estates which he had power to bar are also barred; and when a tenant in tail dies before his right of action is barred, the right of action in respect of all estates which he had power to bar, is barred on the expiration of the period which would have barred the tenant in tail himself if he had so long lived. Moreover, a person in possession under a base fee created by any tenant in tail, will acquire the fee simple absolute, if he continues in possession for twelve years from the time when such tenant in tail might, without the consent of any other person, have created a fee simple absolute (a).

No entry on the land, unless it amounts to resumption of possession, and no 'continual claim' on or near the land, will prevent the running of time (b). Possession by one co-owner of the whole or more than his share of land or the profits of it, is not to be deemed, as it formerly was, the possession of any other co-owner (c); so one co-owner can acquire title by possession against other co-owners. So also the possession of a younger brother, or other relation, of an heir is not to be deemed the possession of the heir (d).

A person claiming any land or rent in equity, must bring his action to recover the same within the period during which he might have brought an action for the recovery thereof, if his estate had been legal instead of equitable (e). In this respect equity follows the law. But, as regards land or rent vested in any trustee upon an express trust, when the land or rent has been conveyed to a purchaser for a valuable consideration, with notice of the trust, the right of the *cestui que trust* to sue the purchaser first

(a) R. P. L. Act, 1833, ss. 21-23; R. P. L. Act, 1874, s. 6; *Austin v. Llewellyn* (1853) 9 Exch. 276; *Dawkins v. Lord Penrhyn* (1877) 6 Ch. D. 318.

(b) R. P. L. Act, 1833, s. 11.

(c) *Ibid.* s. 12.

(d) *Ibid.* s. 13.

(e) R. P. L. Act, 1833, s. 24; R. P. L. Act, 1874, s. 1.

accrues upon such conveyance (a) ; and the right to sue the trustee himself will never be barred so long as he retains the property which is the subject of the action (b).

As regards cases of concealed fraud, the right to sue accrues when the fraud was, or might with reasonable diligence have been, discovered by the person injured (c) ; but not so as to enable the owner of the land or rent to sue any *bond fide* purchaser who did not assist in the commission of the fraud, and who, at the time of his purchase, did not know, and had no reason to believe, that a fraud was being committed (d). The Acts do not, however, interfere with any rule of equity refusing relief, on the ground of acquiescence or otherwise, to any person whose right to bring the suit may not be barred by virtue of the statute (e).

As regards mortgaged estates, when the mortgagee has obtained possession, the mortgagor, or any person claiming through him, may not take proceedings to redeem the mortgage, except within twelve years next after the time at which the mortgagee obtained the possession (f), or from the last acknowledgment in writing which may have been given by the mortgagee of the mortgagor's title or his right of redemption, either to the mortgagor himself, or to some person claiming his estate, or to his agent (g). An acknowledgment given to one of several mortgagors is as good as if given to all ; but one given by one of several mortgagees, having separate interests, only extends the time for redemption as regards

(a) R. P. L. Act, 1833, s. 25.  
(A purchaser for valuable consideration of the legal estate without notice obtains a good title against the *cestui que trust*.)

(b) Trustee Act, 1888, s. 8.

(c) R. P. L. Act, 1833, s. 26 ;  
*Bulli Coal Co. v. Osborne* [1899]  
A. C. 351 ; *Re McCallum* [1901]  
1 Ch. 143.

(d) R. P. L. Act, 1833, s. 26 ;

*Chetham v. Hoare* (1870) L. R. 9  
Eq. 571 ; *Vane v. Vane* (1873)  
L. R. 8 Ch. 383.

(e) R. P. L. Act, 1833, s. 27 ;  
*De Bussche v. Alt* (1878) 8 Ch. D.  
286 ; *Blake v. Gale* (1885) 31  
Ch. D. 196.

(f) *Thornton v. France* [1897]  
2 Q. B. 143.

(g) R. P. L. Act, 1874, s. 7.

his interest in the mortgage (*a*), while an acknowledgment given by one of several mortgagees jointly entitled has no effect (*b*). When the mortgagor has been in possession, a corresponding period is allowed to the mortgagee to recover the land, dating from the time when his right of action accrued (*c*), or from the last acknowledgment in writing of his title (*d*), or from the last payment of principal or interest (*e*). In the case of a mortgage in ordinary form, the right of action accrues to the mortgagee, as regards ejectment, from the date of the mortgage (*f*), and as regards foreclosure from the time when the money becomes payable (*g*). As between mortgagors and mortgagees, no extension of time is allowed for disabilities (*h*).

An action for the recovery of land by a spiritual or charitable corporation sole can only be brought within sixty years or two incumbencies and six years (*i*), and for the recovery of an advowson within three incumbencies or sixty years, if they extend over less than that period, or within one hundred years at most, after an adverse presentation, unless there has been a rightful presentation meantime (*k*).

At the expiration of the statutory period, the title of the person against whom time has run is extinguished (*l*), and cannot be revived by subsequent re-entry (*m*) or acknowledgment (*n*). But, in the case of possession under

(*a*) R. P. L. Act, 1874, s. 7.

(*b*) *Richardson v. Younge* (1871) L. R. 6 Ch. App. 478.

(*c*) R. P. L. Act, 1833, s. 3; R. P. L. Act, 1874, s. 1.

(*d*) R. P. L. Act, 1833, s. 14.

(*e*) R. P. L. Act, 1837; R. P. L. Act, 1874, s. 9. An action for foreclosure is within this provision. (*Harlock v. Ashberry* (1882) 19 Ch. D. 539, C. A.) As to the mortgage money see *post*, pp. 490, 491.

(*f*) *Doe v. Lightfoot* (1841) 8 M. & W. 553.

(*g*) *Re Brown* [1893] 2 Ch., at p. 305; *Kibble v. Fairthorne* [1895] 1 Ch., at p. 225.

(*h*) *Kinsman v. Rouse* (1881) 17 Ch. D. 104; *Forster v. Patterson*, *ib.* 132.

(*i*) R. P. L. Act, 1833, s. 29.

(*k*) *Ibid.* ss. 30-33.

(*l*) R. P. L. Act, 1833, s. 34.

(*m*) *Re Jolly* [1900] 2 Ch. 616.

(*n*) *Re Hobbs* (1887) 36 Ch. D. 553.



a tenancy from year to year, a subsequent payment of rent will revive the reversioner's title (a); and, in the case of possession by a mortgagor, a subsequent payment of interest will revive the title of the mortgagee (b).

A suit for the recovery of land cannot be brought by the Crown after the lapse of *sixty* years (c).

The effect of possession as regards land the title to which has been registered under the Land Transfer Act, 1897, has been dealt with elsewhere (d).

## II. *The Statutes of Limitation as applicable to money charged on land or secured by judgments, and to legacies.*

An action to recover money secured by mortgage, judgment, or lien, or otherwise charged upon or payable out of land or rent, must be brought within twelve years from the time when a present right to receive it has accrued to a person capable of giving a discharge, or from the last payment of principal or interest, or from the last written acknowledgment given by the person by whom the money is payable, or his agent, to the person entitled to it, or his agent (e). This provision bars after twelve years the personal remedy of a mortgagee on the covenant under seal in the mortgage (f), and also the personal obligation under a covenant to pay a rent charge (g). But it does not apply to an action to recover rent under a lease secured by covenant (h). It also applies to all judgments, not merely to those which are a charge on land (i). An action to recover a legacy must also be

(a) *Bunting v. Sargent* (1879) 13 Ch. D. 330, 333.

(b) See terms of R. P. L. Act, 1837.

(c) Crown Suits Acts, 1769 and 1861.

(d) See *ante*, vol. i., pp. 494, 495.

(e) R. P. L. Act, 1874, s. 8.

(f) *Sutton v. Sutton* (1883) 22 Ch. D. 511. An action on the bond or covenant of a surety

will, however, only be barred after twenty years. (*Re Frisby* (1889) 43 Ch. D. 106.) As to obligations under seal, see *post*, pp. 490, 491.

(g) *Shaw v. Crompton* [1910] 2 K. B. 370.

(h) *Darley v. Tennant* (1885) 53 L. T. 257.

(i) *Hebblethwaite v. Peever* [1892] 1 Q. B. 124.

brought within the same period of twelve years (a); even when it is payable out of personal estate only (b).

No arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, are recoverable, except within six years after the same have become due, or been acknowledged to the person entitled thereto or his agent, in writing signed by the person by whom they were payable, or his agent; but where a prior mortgagee, within one year next before action, has been in possession, the second mortgagee may in his action recover the arrears of his interest for the whole period (although exceeding six years) that the prior mortgagee has been in possession (c). When rent due under a lease is secured by covenant, twenty years' arrears may be recovered in an action on the covenant (d).

The existence of an express trust will not prevent time running in the case of money or a legacy charged on land, or arrears of rent or of interest on any sum of money or legacy so charged (e). In the case of a legacy not charged on land, an express trust may prevent the running of time (f).

III. *The Statutes of Limitation as applicable to money secured by specialty, to a recognisance, and to the personal estate of an intestate.*

An action on a contract under seal, technically called a 'specialty,' must be brought within twenty years from the cause of action arising, or from the date of the last payment on account of the principal or interest due under it, or from the last acknowledgment in writing signed by

(a) R. P. L. Act, 1874, s. 8.

(b) *Sheppard v. Duke* (1839) 9 Sim. 567.

(c) R. P. L. Act, 1833, s. 42; *Edmunds v. Waugh* (1866) L. R. 1 Eq. 418; *Ex parte Clarke* (1867) L. R. 3 Eq. 313; *Marshfield v.*

*Hutchings* (1887) 34 Ch. D. 721.

(d) Civil Procedure Act, 1833, s. 3; *Paget v. Foley* (1836) 2 Bing. N. C. 679.

(e) R. P. L. Act, 1874, s. 10.

(f) See *post*, p. 494.

the party to be charged or his duly authorised agent (a). A proceeding on a recognisance must be brought within the same time (b). The law as to disabilities is the same as in the case of simple contract debts (c).

Actions to recover any share of the personal estate of an intestate in the possession of his legal representative, or of the Crown, must be brought within twenty years after a present right to receive the same first accrued (d).

#### IV. *The Statutes of Limitation as applicable to simple contracts and certain personal actions.*

An action on a contract not under seal, technically called a 'simple contract,' must be brought within six years (e) from the date of the breach, or from the date of the last payment on account of principal or interest due under it, or from the date of the last written acknowledgment (f), or promise to pay, signed by the party to be charged (g) or his duly authorised agent (h).

If a simple contract debt is secured on land, the personal remedy will be barred at the end of *six* years; but the remedy against the land will not be barred till the end of *twelve* years (i).

The following actions must also be brought within six years from the date of the accrual of the right of action, viz.: actions for account (k) or on the case, for arrears of rent not secured by covenant, actions for trespass to land or chattels, conversion (l), replevin,

(a) Civil Procedure Act, 1833, ss. 3, 5. (As to the effect of money secured by specialty being also secured on land, see *ante*, p. 488.)

(b) *Ibid.*

(c) See *post*, pp. 492, 493.

(d) Law of Property Amendment Act, 1860; Intestates' Estates Act, 1884, s. 3.

(e) Limitation Act, 1623 (21 Jac. 1, c. 16), s. 3.

(f) *Re Emmett* (1907) 95

L. T. 755.

(g) Statute of Frauds Amendment Act, 1828, s. 1.

(h) Mercantile Law Amendment Act, 1856, s. 13.

(i) *Barnes v. Glenton* [1899] 1 Q. B. 885.

(k) Including merchants' accounts (M. L. A. Act, 1856, s. 9).

(l) *Wilkinson v. Verity* (1871) L. R. 6 C. P. 206; *Spackman v. Foster* (1883) 11 Q. B. D. 99.

deceit (a), seduction, nuisance, negligence (b), malicious prosecution, libel, and slander actionable only on proof of special damage (c); also actions on an award where submission was not by specialty, for a copyhold fine, for an escape, or for money levied on a *feri facias* (d).

The following actions must be brought within *four* years of the happening of the cause of action, viz.: assault, battery, and false imprisonment (e).

The following actions must be brought within *two* years, viz.: slander actionable without proof of special damage (f), and actions on penal statutes, whether the penalty is limited to the Crown (g) or given to the party grieved (h).

As regards actions to which the Limitation Act, 1623, relates, if the person entitled to sue is, at the date when the right of action accrues, an infant or a lunatic, the period within which he may bring the action commences to run from the date on which the disability ceases (i); and if at the date of the accrual of the cause of action the person liable to be sued is absent beyond the seas (k), the period does not begin to run against the plaintiff

(a) *Gibbs v. Guild* (1882) 9 Q. B. D. 59.

(b) *Mitchell v. Darley Main Colliery Co.* (1884) 14 Q. B. D. 125.

(c) Limitation Act, 1623, s. 3.

(d) Civil Procedure Act, 1833, s. 3.

(e) L. Act, 1623, s. 3.

(f) *Ibid.*

(g) 31 Eliz. (1588) c. 5. In the case of a common informer who gets the benefit of the penalty, the period is one year (*Ibid.*). But see Summary Jurisdiction Act, 1848, s. 11, which provides that an information for any offence punishable on summary conviction must be laid within *six months*.

(h) Civil Procedure Act, 1833, s. 3.

(i) Limitation Act, 1623, s. 7. And see *Le Veux v. Berkeley* (1844) 5 Q. B. 836; *Townsend v. Deacon* (1849) 3 Exch. 706.

(k) 4 & 5 Anne (1706) c. 3 (*al.* 16), s. 19. It is doubtful whether this privilege can be claimed except in the actions specified in the section; and by the Mercantile Law Amendment Act, 1856, s. 12, no part of the United Kingdom, Man, Guernsey, Jersey, Alderney, and Sark, nor the adjacent islands, being part of the dominions of his Majesty, is to be deemed 'beyond seas' within the meaning of the statute of Anne.

until the return of the person absent beyond seas (a). But absence beyond seas, and imprisonment, are no longer disabilities entitling a *claimant* to any extension of time (b); and, once the statute begins to run, it continues to run, notwithstanding any subsequent disability arising by reason of the plaintiff's lunacy, or the defendant's absence beyond the seas (c).

Actions under the Fatal Accidents Act, 1846 (d), in respect of fatal accidents, must be brought within one year after the death of the deceased; and actions for compensation, under the Employers' Liability Act, 1880 (e), within six months from the accident causing injury, or twelve months from the death, and claims under the Workmen's Compensation Act, 1906 (f), within six months from the accident or death.

Actions by personal representatives for injury to the real estate of their deceased must be brought within one year from his death; and actions against personal representatives for injuries done by their deceased to the property of another within six months from the testator's death (g). Actions against public authorities or public officers, for any tortious act or default in the execution of their public or statutory duties, must be brought within six months of the occurrence of the act or omission complained of (h).

There appears to be no statute limiting the time within which an action to redeem or foreclose a mortgage of pure

(a) Coverture is no longer a disability since the Married Women's Property Acts.

(b) Mercantile Law Amendment Act, 1856, s. 10.

(c) *Rhodes v. Smethurst* (1838) 4 M. & W. 42; *Lafond v. Rud-dock* (1853) 13 C. B. 813.

(d) 9 & 10 Vict. c. 93, s. 1.

(e) S. 4.

(f) S. 2.

(g) Civil Procedure Act, 1833, s. 2. (There seems to be no

special limit to the time of bringing actions by personal representatives in respect of injuries to their deceased's personality.

(h) Public Authorities Protection Act, 1893; *Polley v. Fordham* [1904] 2 K. B. 345; *Parker v. London County Council*, *ibid.* 501; *Tilling v. Dick, Kerr & Co.* [1905] 1 K. B. 562; *Lyles v. Southend-on-Sea Corporation* [1905] 2 K. B. 1.

personalty must be brought (a). But if realty and personalty are comprised in one mortgage, and the right of the mortgagor is barred as regards the realty, he will not be allowed to redeem the personalty (b).

There is an important distinction to be observed between the law of limitation as affecting realty and that affecting personalty; namely, that the Real Property Limitation Act, 1833, has the effect of extinguishing the right of the party in delay, as well as of barring his remedy (c), while the Limitation Act, 1623, and the Civil Procedure Act, 1833, bar the remedy only, and do not extinguish the right. So that, though a creditor cannot bring an action to recover his debt after the expiration of the limited period, there is nothing to prevent him from obtaining payment of it after that period in any other manner; for example, by the exercise of any lien that he may hold on the property of the debtor, or, if he is the debtor's executor, by virtue of his right of retainer. But he may not set off a debt, the remedy for which is statute-barred at the time of the commencement of the action (d).

#### V. *The Statutes of Limitation as applicable to trustees.*

In the case of express trusts, if the trustee retains property, or has converted it to his use, or has been guilty of fraud, there is no limitation of the time within which an action may be brought against him to recover it (e). In other cases, however, an action against a trustee must be brought within the time within which it would have to be brought if no trust existed (f). If the action is to

(a) *London Bank v. Mitchell* [1899] 2 Ch. 161; *Re Stucley* [1906] 1 Ch. 67.

(b) *Charter v. Watson* [1899] 1 Ch. 175.

(c) See *ante*, p. 490.

(d) Statute of Frauds Amendment Act, 1828, s. 4; *Walker v. Clements* (1850) 15 Q. B. 1046;

*Smith v. Betty* [1903] 2 K. B. 317, 323. (As to set-off, see *post*, pp. 552, 553.)

(e) R. P. L. Act, 1833, s. 25; Judicature Act, 1873, s. 25 (2); Trustee Act, 1888, s. 8 (1).

(f) Trustee Act, 1888, s. 8 (1); *How v. Winterton* [1896] 2 Ch. 626.

recover property, and there is no statute which applies (for example, in the case of an action for breach of trust), the action must be brought within six years from the time when the cause of action arose (*a*). In the case of a breach of trust, time runs from the breach, not from the time when consequent loss occurred (*a*). Time does not, however, begin to run against a beneficiary until his interest is in possession (*b*).

In the case of money, including a legacy charged on land, or arrears of interest on money so charged, or arrears of rent, the mere existence of an express trust does not prevent time running in favour of the defendant (*c*).

As regards constructive trusts, in some cases the Statute of Limitations can be set up; while in others, unless the Trustee Act, 1888, applies, the statutes will be no defence (*d*).

It may be convenient, after this explanation, to summarise in tabular form the prescribed times for bringing actions and claims.

### I.—AS REGARDS LAND.

CHARACTER OF ACTION.	TIME FOR COMMENCING ACTION.
Action at law or in equity to recover the possession of land:—	
(1) in general - - -	Twelve years, from accruer of right to the possession.

(*a*) *Re Somerset* [1894] 1 Ch. 231.

(*b*) T. Act, 1888, s. 8 (1).

(*c*) R. P. L. Act, 1874, s. 10.

(*d*) See *Soar v. Ashwell* [1893] 2 Q. B. 390, 400, 405.

CHARACTER OF ACTION.	TIME FOR COMMENCING ACTION.
(2) Where any disability at time of right to possession accruing,	in addition to the twelve years, six years, from termination of disability, provided thirty years in all from time the right to the possession accrued be not exceeded.
(3) Where tenant for life has been dispossessed, and has continued dispossessed till his death, remainderman must sue ;	within twelve years from the tenant for life's dispossession, or within six years from his death.
(4) Where tenant in tail has been dispossessed, and has continued dispossessed till his death, remainderman must sue ;	within twelve years from the tenant in tail's dispossession.
(5) Against tenant at will or against tenant from year to year under oral agreement ;	twelve years from the end of the first year of the tenancy, or, in the case of tenant from year to year, from last payment of rent.
(6) When an ordinary lessee at a rent has paid rent to an adverse claimant ;	twelve years from the first adverse payment of the rent, unless rent is paid to the owner.
(7) When an ordinary lessee at a rent has not paid rent to any one ;	twelve years from the end of the lease.



CHARACTER OF ACTION.	TIME FOR COMMENCING ACTION.
(8) Where trustee has tortiously sold to a purchaser with notice ;	twelve years from the sale.
(9) Where there has been a fraudulent dispossession ;	twelve years from the discovery of the fraud.
(10) Where the mortgagor is the plaintiff ;	twelve years from the taking of possession by the mortgagee, or last acknowledgment.
(11) Where the mortgagee is the plaintiff ;	twelve years from the right of action accruing to the mortgagee, or from the last payment of principal or interest.
(12) Action to recover glebe lands and the like ;	within sixty years, in general ; or, in some cases, three incumbrances.
(13) Action to recover advowsons and the like ;	within one hundred years, at the most ; or, in some cases, two incumbrances and six years.
(14) Proceedings by the Crown to recover land ;	within sixty years, as a rule.

## II.—AS REGARDS MONEY CHARGED ON LAND, ETC.

CHARACTER OF ACTION.	TIME FOR COMMENCING ACTION.
(1) Action to recover money charged on land (by mortgage, lien, or otherwise), or secured by a judgment, or any legacy ;	twelve years after the right to receive the money or legacy has accrued.
(2) Action to recover arrears of rent or of interest on any money or legacy secured on land ;	six years' arrears only recoverable.

## III.—AS REGARDS SPECIALTY DEBTS AND INTESTACIES.

CHARACTER OF ACTION.	TIME FOR COMMENCING ACTION.
(1) Action of debt on specialty contract (including rent under an indenture of lease and debts on recognisances) : (A) in general ; (B) when included in a mortgage deed ;	twenty years ; twelve years.
(2) Action to recover personal estate of an intestate.	twenty years after right to receive the same accrued.

IV.—AS REGARDS SIMPLE CONTRACT DEBTS AND  
CERTAIN OTHER PERSONAL ACTIONS.

CHARACTER OF ACTION.	TIME FOR COMMENCING ACTION.
(1) Action on simple contract, or for rent on parol letting ;	six years.
(2) Action of account or on the case generally ;	six years.
(3) Action for money payable under an award, when the submission is not under seal ;	six years.
(4) Action for copyhold fine ;	six years.
(5) Action of detinue, trover, or conversion ;	six years.
(6) Action of replevin ;	six years.
(7) Action of trespass to land or chattels ;	six years.
(8) Action of trespass to the person (including assault, battery, and false imprisonment) ;	four years.
(9) Action for libel and ordinary slander ;	six years.
(10) Action for slander actionable without proof of special damage ;	two years.
(11) Actions on penal statutes ;	two years, in most cases.
(12) Actions against public authorities or public officers generally ;	six months.
(13) Claims for compensation for workmen ;	six months in most cases.

CHARACTER OF ACTION.	TIME FOR COMMENCING ACTION
(14) Action by personal representatives for injury to real estate ;	one year from death.
(15) Action against personal representatives for injury to property done by testator ;	six months from death.

## V.—AS REGARDS ACTIONS AGAINST TRUSTEES.

CHARACTER OF ACTION.	TIME FOR COMMENCING ACTION.
(1) Action against trustee where he retains the property or has converted it to his use, or has been guilty of fraud ;	no limitation of time.
(2) Action against trustee in any other case.	the same period as in actions against other people, or, if no statute is applicable, six years.

## CHAPTER X.

## OF COURTS IN GENERAL.

THE bringing of an action necessarily implies a court or tribunal before, or in, which it is brought. Our next duty will, therefore, be to give some account of the tribunals established in this country. But, before doing so, we may say a few words about courts in general.

[A court is defined to be a place wherein justice is judicially administered (a). All courts of justice in England are now derived from the power of the Crown (b); and in all courts, the King is supposed, in contemplation of law, to be always present, being represented by his judges, whose power is only an emanation from his royal prerogative. For the more speedy, universal, and impartial administration of justice between subject and subject, the law hath appointed a variety of courts, some with a more limited, others with a more extensive, jurisdiction; some constituted to inquire only, others to hear and determine; some to determine in the first instance, others upon appeal and by way of review. All these in their turns will be taken notice of in their respective places; but first we shall mention one distinction that runs through them all; viz. that some are courts of record, and others not of record.

A *court of record* is one whereof the acts and judicial proceedings are enrolled for a perpetual memorial and testimony; which rolls are called the records of the court. And these records are of such high authority, that their

(a) Co. Litt. 58.

(b) Co. Litt. 260.

[truth is not to be called in question. For nothing shall be averred against a record, nor shall any plea, or even proof, be admitted to the contrary (a). And if the existence of a record be denied, it shall be tried by nothing but itself, that is, upon bare inspection whether there be any such record or no; else there would be no end of disputes. But this rule does not prevent the court from inquiring, *e.g.*, whether the record (in the case of a judgment debt) was based on no consideration, a matter which is often very material in bankruptcy (b); also, if there appear any mistake of the clerk in making up the record, the court will direct him to amend it.] And in general, all slips in legal proceedings (including records) may be amended by an order of the court, to be obtained in a summary way (c).

[All courts of record are the courts of the King, in right of his crown and royal dignity (d); and no other court hath authority to fine and imprison for contempt of its authority (e). So that the very erection of a new jurisdiction with the power of fine or imprisonment for contempt, makes it a court of record (f).] But in some courts of record, *e.g.*, in county courts, this power is limited to contempts committed *in facie curiæ*; that is to say, to wilful insults to the judge, or to any juror or witness, registrar or other officer of the court, during his attendance in court, or in going to or returning from the

(a) Co. Litt. 260; see *ante*, vol. i., p. 23.

(b) *In re Tollemache* (1885) 14 Q. B. D. 415, 606; *In re Lennox* (1885) 16 Q. B. D. 316; *Ex parte Scotch Whisky Distillers* (1888) 22 Q. B. D. 83.

(c) Ord. XXVIII. r. 11; *Mellor v. Swire* (1885) 30 Ch. D. 239; *Stanier v. Evans* (1886) 34 Ch. D. 470.

(d) Finch. L. 231.

(e) Hawk. P. C. ii. 22, s. 1;

Bac. Ab. *Courts*, E.; *R. v. Clement* (1821) 4 B. & Ald. 218; *R. v. Davison* (1821) *ib.* 329; *R. v. James* (1822) 5 B. & Ald. 894; *Miller v. Knox* (1838) 4 Bing. N. C. 574; *Doe d. Cardigan v. Bywater* (1849) 7 C. B. 794.

(f) *Groenvelt v. Burwell* (1700) 1 Salk. 200; *Ex parte Fernandez* (1861) 10 C. B. N. S. 3; *R. v. Castro* (1873) L. R. 9 Q. B. 219.

court, and to wilful interruptions of the business of the court, and to wilful misbehaviour in court (a). [*Courts not of record*, on the other hand, are courts of inferior dignity ; and these are not, as a general rule, intrusted by the law with any power to fine or imprison for contempt (b). In these, the proceedings not being enrolled or recorded, as well their existence as the truth of the matters therein contained, shall, if disputed, be tried and determined by a jury (c).

In modern times many proceedings are *ex parte*, e.g., in the case of guardianship and the custody of infants, and there may often be no defendant or respondent ; but, as a general rule, to every court there must be at least three constituent parts, the *actor*, the *reus*, and the *judex* : the *actor*, or plaintiff, who complains of an injury done ; the *reus*, or defendant, who is called upon to make satisfaction for it ; and the *judex*, or judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact, and, if any injury appears to have been done, to ascertain, and by its officers to apply, the remedy. It is also usual, in modern courts, to have solicitors and counsel as assistants.]

Of solicitors we have already spoken fully in this work (d) ; but it may be well to add a few particulars respecting the ranks and legal position of barristers, to what has been previously said (e) with regard to their education and qualifications.

[Of advocates, or, as we otherwise generally call them,

(a) County Courts Act, 1888, ss. 162, 163 ; *Levy v. Moylan* (1850) 10 C. B. 189 ; *R. v. Lefroy* (1873) L. R. 8 Q. B. 134.

(b) *Dyson v. Wood* (1824) 3 B. & C. 449.

(c) 2 Inst. 311 ; *Griesley's Case* (1587) 8 Rep. 38 b ; *Godfrey's Case* (1613) 11 Rep. 43 b. (The distinction between courts of

record and courts not of record is very obscure. But the probability is : that the former were always royal courts, while the latter, though now royal courts, were not so originally.—E. J.)

(d) *Ante*, bk. iv. ch. xviii. pp. 284–308.

(e) See *ante*, vol. i., pp. 8–9.

*counsel*, there formerly were two species or degrees, [namely, barristers and serjeants. Barristers are (as we have seen) admitted after a period of study in the Inns of Court; and in our old books are styled ‘apprentices,’ *apprenticii ad legem*, not having been deemed qualified to execute the full office of an advocate till they were of sixteen years’ standing—at which time, according to Fortescue, they might be called to the state and degree of serjeants, or *servientes ad legem* (a). How antient and honourable the degree of serjeant was, hath been so fully displayed by many learned writers, that it need not be here enlarged on (b); it is sufficient to observe, that serjeants at law were bound, by a solemn oath, to do their duty to their clients (c). It used also to be the custom for the judges to be admitted into this venerable order before they were advanced to the Bench (d); the original of which was probably to qualify the Barons of the Exchequer to become justices of assize (e)]. But the necessity for this rule has now ceased, and with it the custom; it having been enacted, by the Judicature Act, 1873 (f), that no person appointed a judge, either of the High Court of Justice or of the Court of Appeal, shall be required to take or to have taken the degree of serjeant at law. And no serjeants have in fact been created since the year 1875.

[From among the general body of counsel some are from time to time selected, who (on the nomination of the Lord Chancellor) are made by letters patent His Majesty’s Counsel; and the two principal King’s Counsel are called

(a) *De Legibus*, c. 50.

(b) *Ibid.* 10 Rep. pref.; Dugdale, *Orig. Jurid.*; *Case of the Serjeants* (1840) 6 Bing. N. C. 235. To which may be added a tract by Serjeant Wynne, printed in 1765, entitled *Observations touching the Antiquity and Dignity of the Degree of Serjeant at*

*Law*; and the treatise called *Serviens ad Legem*, by Mr. Serjeant Manning.

(c) 2 Inst. 214.

(d) Fortesc. *op. cit.* c. 50.

(e) 14 Edw. 3 (1340) st. 1, c. 16.

(f) S. 8.



the Attorney-General and the Solicitor-General. The first [King's Counsel, under the degree of serjeant, was Sir Francis Bacon; but he was so made *honoris causâ*, and without either patent or fee (a). So that the first of the modern order (who are now the sworn servants of the Crown) seems to have been Sir Francis North, afterwards Lord Keeper of the Great Seal to King Charles the Second (b). These counsel of the Crown answer in some measure to the advocates of the revenue, *advocati fisci*, among the Romans; for they must not be employed in any cause against the Crown, without special licence (c), in which restriction they agree with the advocates of the fisc (d). But, in the imperial law, the prohibition was carried still farther; for, excepting in some peculiar causes, the fiscal advocates were not permitted to be concerned at all in private suits between subject and subject (e).

In addition to the creation of counsel to the Crown, a custom has at some times prevailed of granting letters patent of precedence among themselves, to such barristers as it is thought proper to honour with that mark of distinction, whereby they are entitled to such rank and pre-audience as are assigned in their respective patents (f); which is sometimes next after the King's Attorney-General, but usually next after the counsel to the Crown then being. Barristers with patents of precedence rank promiscuously with the King's Counsel, and sit together with them within the bar of the respective courts, instead of sitting without it, as is the case with counsel in

(a) See his *Letters*, 256.

(b) See his *Life*, by Roger North, 37.

(c) Hence a King's Counsel cannot plead in court for the accused in a criminal prosecution, without permission from the Crown. But this permission is never refused.

(d) Cod. 2, 2, 1.

(e) *Ibid.* 7, 13.

(f) It may be noticed, that when there is a *Queen Consort*, her Attorney and Solicitor-General rank with those of the King's Counsel who have patents of precedence. (Seld. *Tit. of Hon.* 1, 6, 7.)

[general (a) ; but they are not the sworn servants of the King, and, consequently, without any licence had for that purpose, may accept a retainer in any cause against the Crown. And they, and all other counsel, may indiscriminately, and, it is said, subject to certain exceptions, must (b), take upon them the protection and defence of any suitors, whether plaintiffs, or defendants (c) ; who are therefore called their 'clients,' like the dependents upon the antient Roman orators.

The Roman orators, it is to be remembered, practised *gratis* ; for honour merely, or at most for the sake of gaining influence. And so likewise it is established with us, that a counsel can maintain no action for his fees (d) ; which are given, not as *locatio vel conductio*, but as *quiddam honorarium* ; not as a salary or hire, but as a

(a) It may be observed, that, in the Court of Exchequer there were formerly appointed by the court two barristers, called the *post-man* and the *tub-man* (from the places in which they sat), who had a precedence in motions. (See *R. v. Bishop of Exeter* (1840) 7 M. & W. 188.)

(b) See a correspondence in *Times Newspaper*, 1913, June 14th, *et seq.*

(c) At one time, an exception to this existed as regarded the Court of Common Pleas ; the serjeants having the exclusive privilege of being heard in that court, at its sittings in *banc*. And though, in 1834, a warrant issued under the sign manual, directing that this privilege should cease, yet the Court of Common Pleas refused to act upon its authority, and decided that, as the privilege was founded on immemorial usage, it could not be taken away by the warrant of the Crown. \* (*Case of the Ser-*

*jeants* (1840) 6 Bing. N. C. 235.)

However, it was enacted, by the Parliamentary Voters' Registration Act, 1843, s. 61, that, in appeals to the Common Pleas from the revision courts, all barristers should be entitled to audience ; and afterwards, by 9 & 10 Vict. (1846) c. 54, it was provided generally, that all barristers, according to their respective rank and seniority, should have equal rights and privilege of practising, pleading, and audience, in the Common Pleas, together with the serjeants.

(d) *Moor v. Row* (1629) 1 Ch. Rep. 21 ; and, as regards the effect of a *special contract* to pay a fixed sum of money, instead of the usual fees, see *Kennedy v. Brown* (1863) 13 C. B. N. S. 677 ; *Mostyn v. Mostyn* (1870) L. R. 5 Ch. App. 457 ; and *The Queen v. Doutre* (1884) L. R. 9 App. Ca. 745.

[mere gratuity, which a counsellor cannot demand without doing wrong to his reputation. And so it was also laid down with regard to advocates in the civil law (a); whose *honorarium* was directed by a decree of the senate not to exceed in any case ten thousand sesterces, or about 80*l.* of English money (b).]

It is also deserving of notice, that a counsel may, on his client's behalf, compromise the case, without any express instructions so to do (c); but not contrary to express directions, nor can he disregard an express limit imposed by the client on his authority (d). [Also, that in order to encourage due freedom of speech in the lawful defence of their clients, and at the same time to give a check to the unseemly licentiousness of prostitute and illiberal men, (a few of whom may sometimes insinuate themselves even into the most honourable professions,) it hath been holden, that a counsel is not answerable for any matter by him spoken in court relative to the cause in hand, and suggested in his client's instructions; although it may reflect upon the reputation of another, and even prove absolutely groundless (e). But he is not therefore privileged to repeat the same matters out of court (f); and, even in court, if he mention an untruth of his own invention, or even upon instructions, if it be impertinent to the cause in hand, he is then liable to an action at the suit of the party injured (g). Also, counsel guilty of deceit or collusion were, by the statute of Westminster the First (1275, 3 Edw. I.), c. 28, made punishable with imprisonment for a year and a day, and

(a) Dig. 11, 6, 1.

(b) Tac. Ann. 1, 11, 7.

(c) *Mole v. Smith* (1820) 1 Jac. & W. 673; *In re Hobler* (1844) 8 Beav. 101; *Swinfen v. Swinfen* (1856) 18 C. B. 485; 1 C. B. N. S. 364; 24 Beav. 554; *Chambers v. Mason* (1858) 5 C. B. N. S. 59; *Swinfen v. Lord Chelmsford* (1860) 5 H. & N. 890; *Strauss v.*

*Francis* (1866) L. R. 1 Q. B. 379.

(d) *Neale v. Gordon Lennox* [1902] A. C. 465.

(e) *Hodgson v. Scarlett* (1818) 1 B. & Ald. 232; *Munster v. Lamb* (1883) 11 Q. B. D. 588.

(f) *Flint v. Pike* (1825) 4 B. & C. 473.

(g) *Brook v. Montague* (1605) Cro. Jac. 90.

[perpetual silence in the courts—a punishment that even in more modern times has been inflicted for gross misdemeanors in practice (a).]

As was observed at the beginning of the present chapter, some courts are of an inferior or limited jurisdiction, while others are of a superior and universal authority. This is an important distinction; inasmuch as an action brought in any of the former class is always liable to a plea of want of jurisdiction, while no such plea can (with rare exceptions) be urged in a superior court. Moreover, the superior courts have a coercive or restraining jurisdiction over the inferior; not merely by way of *appeal*, but by way of *prohibition* to forbid further proceedings in any matter beyond the jurisdiction of the inferior courts. We shall, accordingly, deal, first, with courts of superior or unlimited jurisdiction, then with courts of inferior or limited jurisdiction, and finally with those special prerogative writs by which the coercive or restraining influence above alluded to is exercised.

(a) *Redding's Case* (1680) Sir T. Raym. 376.

## CHAPTER XI.

## OF THE SUPREME COURT OF JUDICATURE.

THE existing superior courts of common law and equity, in theory, owe their existence and organisation to the changes introduced by the Judicature Acts of 1873 and 1875, which came into operation on the 1st November, 1875 (*a*), and to the various statutory amendments of those Acts which have since been adopted (*b*). But, inasmuch as the Judicature Acts in substance only rearranged and incorporated the superior courts existing at the time when they took effect, it will be advisable to

(*a*) Judicature Act, 1874, s. 2.

(*b*) The Judicature Acts are : 36 & 37 Vict. (1873) c. 66 ; 37 & 38 Vict. (1874) c. 83 ; 38 & 39 Vict. (1875) c. 77 ; 39 & 40 Vict. (1876) c. 59 ; 40 & 41 Vict. (1877) c. 9 ; 42 & 43 Vict. (1879) c. 78 ; 44 & 45 Vict. (1881) c. 68 ; 46 & 47 Vict. (1883) c. 29 ; 47 & 48 Vict. (1884) c. 61 ; 53 & 54 Vict. (1890) c. 44 ; 54 & 55 Vict. (1891) c. 14 ; 54 & 55 Vict. (1891) c. 53 ; 57 & 58 Vict. (1894) c. 16 ; 62 & 63 Vict. (1899) c. 6 ; 2 Edw. 7 (1902) c. 31 ; 8 Edw. 7 (1908) c. 51 ; 9 Edw. 7 (1909) c. 11 ; 10 Edw. 7 and 1 Geo. 5 (1910) c. 12. (These statutes are not all technically included in the ' Judicature Acts, 1873-1910 ' ; but they are all concerned with the constitution and working of the Supreme Court.) Various orders and rules of practice have

from time to time been made, by the ' Rule Committee ' under these Acts, the principal of which (now in force) are those of 1883 ; but others have since been added to these. There are also the orders as to court fees, and rules as to funds in court ; besides a great variety of rules under particular statutes. The multiplicity of these statutory rules having become exceedingly embarrassing, the Rules Publication Act, 1893 (56 & 57 Vict. c. 66), has been passed to regulate the making of such rules, and to provide for their being duly known before they become operative. By the Judicature (Rule Committee) Act, 1909, the Committee now includes two practising barristers, and two practising solicitors.

commence with a brief account of the old superior courts of common law and equity.

[I. *The Court of King's Bench*.—This court was so called because the King used originally to sit there in person, whence the style of the court was *coram rege*; and after he had ceased to do so, he was deemed to be actually present. Originally, therefore, this court did not sit in any fixed place; but followed the King's person wherever he went. For which reason all process which issued out of this court in the King's name was originally made returnable '*ubicunque fuerimus in Angliâ*.'

The jurisdiction of the court was very high and transcendent. It kept all inferior jurisdictions within the bounds of their authority, and might either remove their proceedings to be determined before it, or prohibit their further progress below (*a*). It superintended all civil corporations in the kingdom. It commanded magistrates and others to do what their duty required, in every case where there was no other specific remedy. It protected the liberty of the subject by a speedy and summary interposition (*b*). It took cognisance of both criminal and civil causes; the former on what was called the Crown side, and the latter on the plea side (*c*) of the court. The jurisdiction on the Crown side of the court will be considered hereafter (*d*); but on its plea side, the court exercised (though originally by usurpation grounded on a legal fiction (*e*)) a general jurisdiction and cognisance of

(*a*) *Farquharson v. Morgan* [1894] 1 Q. B. 552.

(*b*) These powers the court exercised by means of the appropriate prerogative writs, of which a brief account will be found in chapter xix.

(*c*) Chief Justice's Pension Act, 1825.

(*d*) *Post*, bk. vi. ch. x. (vol. iv., pp. 240–245).

(*e*) This usurpation of the Court of King's Bench originated as follows. The jurisdiction of the court in civil actions was formerly confined to actions of trespass or other injury, committed *vi et armis*, and to civil actions (other than actions real), in which the defendant was an officer of the court, or was in the custody of the marshal of the

[all actions between subject and subject ; excepting only matters affecting the revenue of the Crown, which last-mentioned matters were assigned to the Court of Exchequer, and excepting also real actions, which were within the exclusive jurisdiction of the Court of Common Pleas (a).] From the judgments of the King's Bench, proceedings by way of error lay ultimately to the House of Lords ; there having been an intermediate appeal to the Exchequer Chamber, a court which had been originally constituted as a court of error for the Court of Exchequer, by the 31 Edw. III. st. 1 (1357), c. 12, but which was afterwards remodelled by the Law Terms Act, 1830 (b). By this Act the Court of Exchequer Chamber was constituted a court of error from the judgments of all the three superior courts of common law ; the judges of the court being the judges of the three superior courts, other than of the court whose judgments were to be revised.

II. *The Court of Common Pleas (otherwise called the Court of Common Bench).*—This court probably owed its existence as a permanent tribunal to a purely administrative arrangement made in the reign of Henry the Second. But its name and peculiar prominence date

court. In order to extend the jurisdiction to actions against any defendant, the fiction was invented of *surmising* that the defendant had committed a breach of the peace in Middlesex, or any other county in which the court sat, and in which it was consequently held to possess an extraordinary criminal jurisdiction ; and, by aid of this false suggestion, a writ, called a Bill of Middlesex, or a writ of *latitat* founded on a Bill of Middlesex (as the case might be), was issued against him, by virtue of which he was supposed to be committed to the custody of the

marshal, so as to bring him within the jurisdiction of the court. To this was added, under the *ac etiam* clause, the ground of action which it was the real intention of the parties to try.

(a) The King's Bench originally retained the superintendence of the other two superior courts of common law ; and after judgment given by either of these, recourse might be had to it to correct any error of *law* in the proceedings. But this superintendence was taken from it by the Law Terms Act, 1830, s. 8.

(b) 11 Geo. 4 & 1 W. 4, c. 70, s. 8.

from *Magna Carta*, which provided (a) that *common pleas* should no longer follow the King's *curia*, but be heard in some fixed place, (i.e. Westminster,) instead of where the King might happen to be. It had exclusive jurisdiction in all real actions until they were abolished, and concurrent jurisdiction with the two other courts of common law in all personal actions between subject and subject.

III. *The Court of Exchequer*.—This court had exclusive jurisdiction in revenue cases and in actions to recover debts, duties, or taxes due to the Crown (b). By procedure based on a fiction (c), it afterwards acquired a concurrent jurisdiction in all personal actions between subject and subject; without, however, losing its exclusive jurisdiction in revenue cases. It was, in fact, originally a department of the royal exchequer; which, in addition to its principal and proper business of receiving and issuing the King's revenue, undertook incidentally to settle legal questions arising in the course of its revenue proceedings, and thus developed a 'plea side.' This peculiar origin

(a) Cap. 17 (ed. Stubbs).

(b) 4 Inst. 103-116; *A.-G. v. Sewell* (1838) 4 M. & W. 77.

(c) This usurpation of the Court of Exchequer originated as follows. According to its original constitution, it was the duty of this court to call the King's farmers and debtors to account; and these farmers and debtors were privileged, in their turn, to sue and implead in the same court all persons owing them money. For this purpose, they resorted to a writ called a *quo minus*, in which the plaintiff suggested that he was the King's farmer or debtor, and that the defendant had done him the injury or damage complained of, *quo minus sufficiens existit* ("by which he is the less able") to

pay the King his debt or rent. By gradual connivance, this *surmise* of being debtor to the King was allowed to be inserted by plaintiffs who were not in fact debtors to the King at all; and thus came to be considered as mere words of course, so as to open the court to litigants generally. Moreover, the same fiction was permitted on the equity side of the court. And when the writ of *quo minus* was abolished, by 2 & 3 Will. 4 (1832) c. 39 (commonly known as the Uniformity of Process Act), the new method, which was then substituted, gave a direct and proper jurisdiction to this court, in matters of private debt generally.



of the court was marked by the fact that its judges were entitled *barones* (or 'liege men'), simply; not *justitiiarii* (or 'judges'). Until 1841, it also had a general equitable jurisdiction, which in that year was transferred to the Court of Chancery (*a*).

IV. *The Court of Exchequer Chamber*.—This was, as has been said, a Court of Appeal, originally from the Court of Exchequer, and later from any of the three above-mentioned courts of common law (*b*); and it consisted of the common law judges other than those from whose court the appeal by proceedings in error was brought. From the Exchequer Chamber an appeal lay to the House of Lords.

V. *The Court of Chancery*.—This court is said to have taken its name from the Chancellor who presided over it. Originally his duties were ministerial, not judicial. He was head of the writ office or chancery, out of which were issued in the King's name the original writs used in the courts of common law; and, in 1285, he was authorised by the Statute of Westminster the Second (*c*), to vary the forms of writ then in use, so that justice might be done in the common law courts in cases which did not fall precisely within the original forms of writs. It was to the exercise of this power that the courts of common law owed the form of personal action known as 'trespass on the case' (*d*), which enabled them to entertain a wide class of claims not falling within any other recognised form of action.

Notwithstanding, however, the power given for devising new forms of action, the courts of common law, owing to the technicality of their procedure, the strict regard to precedent, and their inability or unwillingness to adapt

(a) Court of Chancery Act, 12; Law Terms Act, 1830, s. 8.  
 .. 1841. (c) 13 Edw. 1, c. 24.

(b) 31 Edw. 3 (1357) st. 1, c. (d) See *ante*, p. 475.

themselves to changing conditions, were not always able to grant any remedy, or any effective remedy, in cases where natural justice demanded that relief should be given. In these circumstances, the only course open to the person aggrieved was to appeal to the King, the fountain of justice, to exercise the royal prerogative in his behalf. As petitions for such extraordinary relief became more common, they were referred to the Chancellor for consideration, in virtue of his leading position in the King's Council, and his office of 'guardian of the king's conscience,' to deal with the subject-matter of the petition on its merits. For, until the sixteenth century, the Chancellor was generally an ecclesiastic, and, until the end of the seventeenth, a statesman, rarely a lawyer; and his natural sympathy towards conveyances to uses, which were originally devised to benefit the Church, probably gave the start to his judicial activity. In course of time, the court of the Chancellor came to be recognised as a tribunal distinct from that of the King's Council; and, as the work of the court increased, the Chancellor was assisted in his judicial functions by the Master of the Rolls (*a*), who had been the chief official in the writ office of the Chancery. In 1813 (*b*), a Vice-Chancellor was appointed, owing to the increasing arrears of causes in the court; and in 1842 (*c*), when the equity jurisdiction of the Court of Exchequer was transferred to the Court of Chancery, two additional Vice-Chancellors were appointed. Such was the constitution of the court before the Judicature Act came into operation.

It may be useful to give here a short summary of the broad distinctions between the Court of Chancery and the courts of common law; in order to show what were the effects of the Judicature Acts. First, as regards the law administered, the courts of common law applied the

(*a*) 3 Geo. 2 (1730) c. 30; 3 &  
4 Will. 4 (1833) c. 94, s. 24.

(*b*) 53 Geo. 3 (1813) c. 24.

(*c*) Court of Chancery Act,  
1842.

principles of the common law, which were supposed to have been established from time immemorial; whereas the Court of Chancery was a court of conscience, applying rules of equity. These rules were naturally vague at first, and did not begin to become fixed or systematised till towards the end of the seventeenth century; and many of them were subsequently invented or developed by different Chancellors from time to time (*a*). Examples of these purely modern doctrines are: the rules as to married women's separate estate, especially as to restraint on alienation, the Rule against Perpetuities, and the rules of equitable waste.

Second, as regards the relief granted, the courts of common law could put a person entitled to land in possession of it by a writ of possession directed to the sheriff, and in actions of tort or on contract could award damages or order the payment of a debt, and enforce the judgment by execution against the property of the defendant; but could not grant an injunction before 1854 (*b*), nor specific performance at any time. The Court of Chancery, on the other hand, could not award damages before 1858 (*c*); but it could compel a person by decree of specific performance to carry out his contract, or by injunction restrain a threatened breach of contract or the commission of a tort, or make such other order as the justice of the case required, and could enforce obedience to its order by arresting and imprisoning the disobedient party until he purged his contempt of the court's authority by obeying its order. Thus, the Court of Chancery was able to forbid a person to assert his legal rights in a court of common law, or compel him to use them for the benefit of another person. In this way it was able, amongst other things, to create a new system of ownership in land; by compelling the

<p>(<i>a</i>) <i>Re Hallett's Estate</i> (1879) L. R. 13 Ch. D., at p. 710, <i>per</i> J ESSEL, M.R.</p>	<p>Act, 1854 (17 &amp; 18 Vict. c. 125), s. 79.</p>
<p>(<i>b</i>) Common Law Procedure</p>	<p>(<i>c</i>) Chancery Amendment Act, 1858 (21 &amp; 22 Vict. c. 27), s. 2.</p>

legal owner to use his legal rights for the benefit of the person entitled to the enjoyment of the land in equity.

Third, as regards the kind of business transacted, the business of the courts of common law was purely litigious, involving the determination of disputed questions of fact or law. Whereas the business of the Court of Chancery was largely administrative ; consisting, as it did, of the execution of trusts, the distribution of the assets of a deceased person, the redemption or foreclosure of mortgages, the sale of property subject to a lien or charge, the wardship and maintenance of infants, the raising of portions or charges on land, the protection of the property of married women, and the taking of accounts.

Fourth, as regards procedure, actions at law were usually commenced by writ of summons, demanding relief as of right ; suits in equity by bill or petition praying for relief, and for the summons of the defendant by *subpœna* to appear and answer the complaint made against him. Evidence in a common law action was given *vivâ voce* in court ; but the parties to the action, and others interested in the result of the proceedings, were not allowed to give evidence until 1851 (a). In a Chancery suit, on the other hand, the evidence was usually given by written answers on oath to interrogatories, or by affidavit ; and the parties were competent witnesses. In a common law action, discovery of documents was not allowed ; and though the court could order an account to be taken, the proceedings on a writ of account were so clumsy and ineffectual, that the process early fell into disuse. On the other hand, the discovery of documents and the taking of accounts were part of the ordinary work of Chancery ; and proceedings in Chancery to obtain discovery of documents in possession of an opponent, or to have an account taken, or to rectify a written document on the ground of mistake, were sometimes even necessary as auxiliary to an action at law.

(a) 14 & 15 Vict. c. 99, ss. 1-3.

In a court of common law, questions of fact were usually decided by a jury ; in the Court of Chancery by a judge. Proceedings in an action at common law were more speedy than those in Chancery. Delays in Chancery suits were aggravated by a system of rehearings and appeals ; for almost any point arising in the course of a suit might be discussed before the Master of the Rolls or a Vice-Chancellor originally, and a second time by way of rehearing ; and again before the Lord Chancellor by way of appeal, and a second time by way of rehearing. After 1851 (*a*), a court of intermediate appeal, consisting of the Lord Chancellor and two Lords Justices in Chancery, was created ; and from that court an appeal lay to the House of Lords.

VI. *The High Court of Admiralty*.—This tribunal was originally the court of the Lord High Admiral, who had jurisdiction, exercised by his deputy, in maritime causes arising on the high seas, and not within the jurisdiction of the courts of common law. The criminal jurisdiction of the Admiral to punish piracy, or other crimes committed on the high seas, was taken away in 1536 (*b*) ; and, after the restoration of Charles the Second, the maritime jurisdiction of the court in civil cases was considerably curtailed by writs of prohibition issued out of the Court of King's Bench. During the Napoleonic wars, the court exercised an important jurisdiction in prize cases ; and the great reputation of Lord Stowell, who was appointed judge in 1798, attracted public attention to the court. As the result of the report of a commission appointed to inquire into the office and duties of the judge of the court, the Admiralty Court Act of 1840 was passed, which re-constituted the High Court of Admiralty, and defined and extended its jurisdiction. The jurisdiction of the court was afterwards

(*a*) Court of Chancery Act, (1867) c. 64.

1851. See also 30 & 31 Vict. (b) 28 Hen. 8, c. 15,

still further extended by the Admiralty Court Act, 1861, and the Merchant Shipping Acts. The jurisdiction could be exercised by proceedings *in rem*, by warrant for the arrest of the ship to which the claim related; and this was the peculiar and distinctive feature of Admiralty jurisdiction (a). An appeal lay to the Judicial Committee of the Privy Council.

VII. and VIII. *The Courts of Probate and of Divorce and Matrimonial Causes.*—These were two purely statutory tribunals created in 1858 (b) to deal with testamentary and matrimonial business respectively, which, before that time, had been dealt with by the ecclesiastical courts, chiefly those of the bishops. All that is necessary to be known about them will appear when we deal with probate and divorce procedure respectively (c).

IX.—*The London Court of Bankruptcy.*—This also was a purely statutory tribunal, under a Chief Judge, created by the Bankruptcy Act, 1869 (d), to deal with bankruptcy business. Like those of the other courts above enumerated, its jurisdiction purported to be transferred to the High Court of Justice by the Judicature Act, 1873 (e); but, before the latter Act came into operation, this clause of it was repealed (f), and the London Court of Bankruptcy did not, in fact, merge in the King's Bench Division until 1st of January, 1884 (g).

X. *The Palatine Courts.*—In the counties palatine of Lancaster and Durham, there were, at the date of the

(a) The jurisdiction and procedure of the Admiralty Court are explained in ch. xv., *post*, pp. 656–658.

(b) 21 & 22 Vict. c. 95 (probate); 21 & 22 Vict. cc. 93 and 108 (divorce).

(c) *Post*, ch. xv. These courts have also been incidentally described in a previous volume (see

*ante*, vol. ii., pp. 317–319.

(d) 32 & 33 Vict. c. 71, s. 61.

(e) S. 3.

(f) Act of 1875, s. 33.

(g) Bankruptcy Act, 1883, s. 93. (The judge at present assigned by the Lord Chancellor for the hearing of bankruptcy business, is Mr. Justice Horridge.)

Judicature Acts, important courts of justice. These were the Court of Common Pleas at Lancaster, and the Court of Pleas at Durham; and also courts of equity, called the Lancaster Chancery Court and the Palatine Court of Durham, which were held before the respective chancellors of those counties palatine, or before judges specially commissioned for that purpose (*a*). Their equity jurisdiction (unless appellate) was not affected by the Judicature Acts; but it has been recently regulated by statute (*b*).

XI. *The Assize Courts*.—These were held from ancient times by judges of the courts of common law who were sent by special commission from the Crown, on *circuits* all over the kingdom, to try civil and criminal cases.

The commissions or authorities which were applicable to civil cases were, the commissions of *assize* and the statutory authority of *nisi prius*; and those applicable to criminal cases were, the commissions of *oyer and terminer*, and of *gaol delivery*. With regard to the authority of *nisi prius*, it may be explained that all questions of fact arising in the King's courts had originally to be tried at Westminster, by a jury returned from the county in which the cause of action arose, 'unless sooner' (*nisi prius*) the judges of assize came into the county in question (*c*);

(*a*) It may be useful to mention here, that there was also a court called The Court of the Duchy Chamber of Lancaster. This court had a concurrent jurisdiction with Chancery as to matters in equity relating to lands holden of the Crown in right of that duchy (*Owen v. Holt* (n. d.), Hob. 77; *Fisher v. Patten* (1671) 2 Lev. 24), which, as Blackstone (vol. iii. p. 78) remarks, is a thing very distinct from the *county palatine* of Lancaster, inasmuch as the duchy includes much territory at a

distance from the county palatine, and particularly a very large district in or near the city of Westminster.

(*b*) See Court of Chancery of Lancaster Acts, 1850 and 1890; and Palatine Court of Durham Act, 1889.

(*c*) The words *nisi prius* were not to be found in the original writ by which the action was commenced; but in the *venire facias*, or writ to the sheriff, which bade him summon a jury of the county and send it to Westminster, 'unless,' etc.

but, by the effect of the Common Law Procedure Act, 1852 (*a*), the trial of civil cases was allowed to take place, as a matter of course, before the judges of assize.

We shall now consider the operation and effects of the Judicature Acts, 1873 and 1875 (*b*), which, as we have said, came into operation on the 1st of November, 1875. In the first place, they created and constituted a new court, called the Supreme Court of Judicature, consisting of the High Court of Justice and the Court of Appeal (*c*). To the High Court of Justice was transferred all the jurisdiction which in 1875 was capable of being exercised by (1) the High Court of Chancery, (2) the Court of King's Bench, (3) the Court of Common Pleas at Westminster, (4) the Court of Exchequer, (5) the High Court of Admiralty, (6) the Court of Probate, (7) the Court for Divorce and Matrimonial Causes, (8) the Court of Common Pleas at Lancaster, (9) the Court of Pleas at Durham, and (10) the courts created by commissions of assize, of *oyer and terminer*, and of gaol delivery (*d*).

For the more convenient distribution of business, the High Court was, however, divided into five divisions, namely, the Chancery Division, the Queen's Bench Division, the Common Pleas Division, the Exchequer Division, and the Probate, Divorce, and Admiralty Division (*e*); and to each division was assigned, speaking generally, the class of business which before 1875 was within the special or exclusive cognisance of the court or courts from which the particular division took its name (*f*). The business which was common to all the common law courts was (by inference) left to be dealt with indifferently by the Queen's Bench, the Common Pleas, or the Exchequer Divisions (*g*). At the end of 1880, the Queen's

(*a*) 15 & 16 Vict. c. 76.

(*b*) 36 & 37 Vict. c. 66, and  
38 & 39 Vict. c. 77.

(*c*) Act of 1873, s. 4.

(*d*) *Ibid.* s. 16.

(*e*) Act of 1873, s. 31.

(*f*) *Ibid.* s. 34.

(*g*) Act of 1873, s. 16.



Bench, Common Pleas, and Exchequer Divisions were united into one division then called the Queen's Bench Division, and now the King's Bench Division (*a*); and in 1884 the bankruptcy business of the London Court of Bankruptcy was, as we have said, assigned to that division under the provisions of the Bankruptcy Act of the previous year (*b*).

The judges of the High Court consist of the Lord Chancellor, who is the president of the Chancery Division, the Lord Chief Justice, who is the president of the King's Bench Division, the President of the Probate, Divorce, and Admiralty Division, and twenty-three other judges, who are styled 'Justices of the High Court'; of whom six sit in the Chancery Division, sixteen (*c*) in the King's Bench Division, and one in the Probate, Divorce, and Admiralty Division. Subject to a few exceptions, all the judges of the High Court have equal power and jurisdiction, and may legally sit in any division (*d*).

The High Court has both original and appellate jurisdiction. Actions commenced in or transferred from a county court or other inferior court to the High Court are tried before a judge alone, if they are tried in the Chancery Division; or by a judge alone or with a jury, if tried in either of the other divisions, or by a judge assisted by nautical assessors, if tried in the Admiralty Division. But if any action requires any prolonged examination of documents, or any scientific or local investigation, which cannot be conveniently made before a jury or conducted by the court, or consists of matters of

(*a*) Order in Council, 16th Dec., 1880.

(*b*) Order of Lord Selborne, C., 1st Jan., 1884, made under s. 93 of the Bankruptcy Act, 1883.

(*c*) Supreme Court of Judicature Act, 1910. Whenever after the 1st August, 1911, the number of puisné judges attached to the

King's Bench Division amounts to fifteen or upwards, any vacancy occurring cannot be filled unless and until an Address is presented by both Houses of Parliament requesting that such vacancy shall be filled.

(*d*) Act of 1873, s. 5.

account, it may, without the consent of the parties, be ordered to be tried before a special referee or arbitrator (*a*). The plaintiff may, within certain limitations, bring his action in any division he chooses. If he brings in one division an action assignable under the Judicature Acts to another division, the judge has power either to retain it (*b*), or to transfer it to the division in which it ought to have been commenced and where it can be more conveniently dealt with. But it is one of the essential principles of the Judicature Acts, that all divisions of the High Court are competent to conduct all kinds of business; and, therefore, the judge ought not to dismiss any for want of jurisdiction (*c*).

The interlocutory proceedings in an action, that is to say, the various proceedings on summonses which take place between the issue of the writ and the trial, are generally in chambers; usually before a master or registrar, but sometimes before a judge (*d*). In the King's Bench Division, a master, and in the Probate, Divorce, and Admiralty Division a registrar, may, subject to a few exceptions, transact all such business and exercise all such jurisdiction as may, under the Judicature Acts and the Rules, be transacted or exercised by a judge in chambers (*d*); but from his exercise of such jurisdiction an appeal lies to the judge in chambers (*e*). In the Chancery Division, the masters represent the judge; and most interlocutory applications are made to them in the first instance. But any party to such application is entitled to take the matter before the judge himself, by way of adjournment, not of appeal (*f*).

(*a*) Arbitration Act, 1889, s. 14.

(*b*) See *Hurst v. Hurst* (1882) 21 Ch. D., at p. 294; *Bradford v. Young* (1884) 26 Ch. D. 656; *The Recepta* [1893] P. 255.

(*c*) *Clanricarde v. Rider* (1898) 1 R. (Ch.) 98. (This decision is not, of course, binding on the

English courts; but the judgment of Fitz-Gibbon, L.J., is instructive.)

(*d*) Ord. LIV. r. 12.

(*e*) *Ibid.* r. 21.

(*f*) *Ibid.* r. 9; Ord. LV. rr. 15 and 69. (See also *Lloyds Bank v. The Princess Co.* (1900) 82 L. T. 559.)

An important part of the jurisdiction of the High Court is exercised by divisional courts, consisting of two or more judges sitting together (*a*). The divisional court of the King's Bench Division exercises both original and appellate jurisdiction (*b*). For example, it has jurisdiction on motion to order a solicitor to be struck off the rolls for misconduct, or to order a person to be attached or committed for contempt, or to order the issue of a writ of mandamus. It hears appeals from, and determines questions of law on cases stated by, quarter or petty sessions, appeals on questions of law from a county court or other inferior court (*c*), appeals from revising barristers, and in proceedings relating to election petitions, parliamentary or municipal, and appeals from a judge in chambers (*d*), where such appeals are permissible (*e*). The divisional court of the Probate, Divorce, and Admiralty Division hears appeals from separation or protection orders made by a court of summary jurisdiction under the Summary Jurisdiction (Married Women) Act, 1895 (*f*), or under the Licensing Act, 1902 (*g*), where the husband or wife is an habitual drunkard, and admiralty appeals from a county court exercising admiralty jurisdiction (*h*), or from a Wreck Commissioner's report to the Board of Trade cancelling or suspending the certificate of the master, engineer, or mate of a ship for misconduct (*i*). The judgment of the divisional court of either division is final; unless leave to appeal to the Court of Appeal is given by the divisional court or by the Court of Appeal (*h*).

(*a*) Jud. Act, 1873, s. 40.

(*b*) Ord. LIX.

(*c*) Under the County Courts Act, 1888, s. 120.

(*d*) Ord. LIX. r. 1.

(*e*) Judicature Act, 1894, s. 1 (4).

(*f*) 58 & 59 Vict. c. 39, s. 11.

(*g*) 2 Edw. 7, c. 28, s. 5.

(*h*) Under the County Courts

(Admiralty Jurisdiction) Act, 1868, s. 27; and the County Courts Act, 1888, s. 120.

(*i*) Merchant Shipping Act, 1894, s. 475.

(*k*) Judicature Act, 1894, s. 1 (5); *Godman v. Moses* (1900) 69 L. J. Q. B. 825; *Moore v. Singer Co.* [1904] 1 K. B. 820.

To the other branch of the Supreme Court of Judicature, viz., the Court of Appeal, was transferred, by the Judicature Act, 1873, all the appellate jurisdiction of (1) the Lord Chancellor and the Court of Appeal in Chancery, (2) the Court of Exchequer Chamber, (3) the Judicial Committee of the Privy Council in appeals from the High Court of Admiralty, and in lunacy appeals from the Lord Chancellor, (4) the Court of Appeal in Chancery of the county palatine of Lancaster, and (5) the Full Court for Divorce and Matrimonial Causes (*a*). The Court of Appeal consists of certain *ex-officio* judges, namely, the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, and the President of the Probate, Divorce, and Admiralty Division, and every person who has held the office of Lord High Chancellor (*b*), and of five ordinary judges (*c*), who are styled 'Lords Justices of Appeal.' But any judge of the High Court may, if so required by the Lord Chancellor, also sit as a judge of the Court of Appeal (*d*); and any Lord of Appeal in Ordinary who, at the time of appointment as such, was either a member of the Court of Appeal or qualified to be a member, may, if he consents, upon the request of the Lord Chancellor, to do so, sit and act as a judge of the Court of Appeal (*e*).

The Court of Appeal has, in general, jurisdiction to hear and determine an appeal from (1) any judgment or order of a divisional court, provided, in cases where the divisional court has itself acted as an appellate tribunal, that leave to appeal has been given by the divisional court or the Court of Appeal (*f*); (2) any

(*a*) Established by the Divorce and Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 55. See the Judicature Act, 1881, s. 9; and *Cleaver v. Cleaver* (1884) L. R. 9 App. Ca. 631.

(*b*) Act of 1891, s. 1. (But such persons cannot be com-

pelled to sit and act.)

(*c*) Act of 1875, s. 4.

(*d*) Appellate Jurisdiction Act, 1908, s. 6.

(*e*) Appellate Jurisdiction Act, 1913, s. 2.

(*f*) Judicature Act, 1894, s. 1 (5).

final judgment or order of the High Court; (3) any interlocutory order of a judge in chambers in matters of practice and procedure, subject, in most cases, to leave to appeal being given (*a*); (4) any decision or order of a county court judge on a question of law under the Workmen's Compensation Act, 1906 (*b*); (5) a judgment of the Liverpool Court of Passage (*c*); (6) a judgment of the Palatine Court of Durham (*d*); and (7) a judgment of the Lancaster Chancery Court (*e*). Over any matter brought on appeal before the Court of Appeal, the court has all the power and jurisdiction of the High Court, and may make any order which ought to have been made in the Court below, or such further order as the justice of the case may require (*f*).

As a rule, three judges are required to constitute the Court of Appeal (*g*); but appeals from interlocutory orders may be heard by two judges (*h*), as also appeals from final judgments where the parties consent (*i*). But, in the latter case, if the judges differ in opinion, the appeal must be argued before three judges before going to the House of Lords (*k*). Generally speaking, the Court of Appeal sits in two divisions, to hear common law and equity cases respectively; but the only limit to the number of divisions in which it may sit is the number of judges available, and any division may, of course, deal with any appellate business which is within the jurisdiction of the Court.

(*a*) Judicature Act, 1894, s. 1 (4).

(*b*) 6 Edw. 7, c. 58, Sched. ii. s. 4; Ord. LVIII. r. 20. And see *Smith v. L. & Y. Ry. Co.* [1899] 1 Q. B. 141; *Simmons v. White, Bros.* [1899] 1 Q. B. 1005; *Fenn v. Miller* [1900] 1 Q. B. 788; *Kenny v. Harrison* [1902] 2 K. B. 168; *Howarth v. Samuelson & Co., Ltd.* [1911] 104 L. T. 907.

(*c*) Liverpool Court of Passage

Acts, 1893 and 1896; *Anderson v. Dean* [1894] 2 Q. B. 222.

(*d*) Palatine Court of Durham Act, 1889, s. 11.

(*e*) Chancery of Lancaster Act, 1890, s. 4.

(*f*) Judicature Act, 1873, s. 19, and Ord. LVIII. r. 4.

(*g*) Act of 1875, s. 12.

(*h*) *Ibid.*

(*i*) Act of 1899, s. 1.

(*k*) *Ibid.*

Hardly less important than the organisation and jurisdiction of the Supreme Court, are the principles upon which its business is carried on. And of these it is important to remember, that the Judicature Act, 1873 (a), provided that the rules of common law and equity were to be concurrently administered, and that every judge of the High Court, in whatever division he might sit, should give effect to every legal or equitable claim or defence or counter-claim, and should grant any legal or equitable remedy, such as damages, specific performance, injunction, or any other kind of relief, to which any of the parties to an action might be entitled in respect of any legal or equitable claim properly brought forward. As there were many matters in which the rules of equity conflicted with those of the common law, (as, for example, the rules as to waste committed by a tenant for life, and as to assignment of debts and choses in action,) the Act (b) declared the rules to be followed in certain enumerated cases, and also provided, generally, as we have seen, that where the rules of equity and common law conflicted in the same matter, the rules of equity were to prevail. The Supreme Court is, therefore, a court exercising in every branch of it a complete common law and equitable jurisdiction (c).

The Judicature Acts do not, however, abolish the distinction between law and equity (d); but merely prescribe which rule is to be followed in cases where the Court of Chancery would, before the Acts, have applied a different rule from that which a court of common law would have applied in the same case. Consequently, where there was no conflict between law and equity before the Acts, the rules of each will continue to be administered as before. The object of the Acts was to enable either party to any

(a) S. 24.

(b) Act of 1873, s. 25.

(c) *Pugh v. Heath* (1882) L. R. 7 App. Ca., at p. 237.(d) *Joseph v. Lyons* (1884) 15 Q. B. D., at p. 285; *Manchester Brewery Co. v. Coombs* [1901] 2 Ch., at p. 617.

action brought in the High Court to obtain whatever legal or equitable remedy or relief is more appropriate to the circumstances of his claim or defence at one hearing, instead of having to apply for different remedies to different tribunals. The Acts did not create new legal or equitable rights ; they merely provided a more simple and effective remedy for enforcing those which existed before. They united the superior courts of law and equity with a view to the administration in one tribunal of one system of rules in place of the two systems known as law and equity ; and the general aim of the Acts was to enable a suitor to obtain, by one proceeding in one court, the same ultimate result as he would have obtained before 1875 by having selected the court which was able to give him the more effective remedy, or brought proceedings in the Court of Chancery and in a court of common law in succession (*a*). Thus, for example, whereas the assignee of a debt had formerly to obtain from the Court of Chancery a decree or order compelling the assignor to bring an action in a court of common law to recover judgment against the debtor for the benefit of the assignee ; the assignee will now simply sue in his own name, making, if necessary, the assignor a defendant. If a person commences in the King's Bench Division an action falling within the class of actions assigned by the Acts to the Chancery Division, the judge may, as has been said, retain it or transfer it to the Chancery Division (*b*) ; but, if he retains it, he must determine it according to the rules which would have been applied if it had been tried in the Chancery Division. And a corresponding rule applies if a ' common law ' claim, *e.g.* of damages for fraud, arises in the course of proceedings in the Chancery Division. Again, a judgment of the High Court given in an action in any division may be enforced by any legal or equitable mode of execution which is in the circumstances appropriate.

(*a*) *Torkington v. Magee* [1902] 2 K. B., at p. 430.

(*b*) Jud. Act, 1875, s. 11 ; Ord. XLIX.

When we come to deal with the details of procedure in the High Court (*a*), we shall have frequent occasion to refer to rules of procedure which regulate these details. Here it is sufficient to say, that, as regards the rules of procedure and practice to be followed in the Supreme Court, the Judicature Acts (*b*) give power to a Rule Committee, consisting of certain judges of the court and others, to make rules of court. In pursuance of such power, rules have been made, called the Rules of the Supreme Court, 1883; and these now consist of seventy-two orders subdivided into rules. These rules regulate the practice in all proceedings in the Supreme Court; but the Judicature Acts, and Order LXXII. of the Rules, provide (*c*) that the procedure and practice in force before the Acts came into operation in 1875 shall remain in force, where no other provision is made by the Acts or the Rules, and so far as they are not inconsistent with the Acts or the Rules. Thus, in probate matters, the practice is still largely regulated by the Probate Rules of 1862, made under the Court of Probate Act, 1857 (*d*); and in divorce business the practice is regulated by the Divorce Rules of 1865, and subsequent rules made under the Matrimonial Causes Act, 1857 (*e*).

(*a*) See *post*, chs. xiii–xv.

1875, s. 21.

(*b*) Including the Judicature (Rule Committee) Act, 1909.

(*d*) 20 & 21 Vict. c. 77.

(*c*) Act of 1873, s. 23; Act of

(*e*) 20 & 21 Vict. c. 85; Judicature Act, 1875, s. 18.



## CHAPTER XII.

## OF THE ULTIMATE COURTS OF APPEAL.

It was one of the objects of the Judicature Act, 1873, to abolish the appellate jurisdiction which formerly resided in the House of Lords and the Judicial Committee of the Privy Council. So far as the House of Lords was concerned, the Act of 1873 professed actually to abolish the appellate jurisdiction (*a*) ; and it made provision for the taking of a similar step by Order in Council, in the case of the Judicial Committee (*b*). But, before the Act of 1873 came into operation, these provisions were suspended by the Judicature Act, 1875 (*c*) ; and they were afterwards entirely repealed by the Appellate Jurisdiction Act, 1876 (*d*). The jurisdictions of the House of Lords and the Judicial Committee, as ultimate Courts of Appeal, accordingly remain.

I. *The House of Lords*.—It is expressly provided by the Appellate Jurisdiction Act, 1876 (*e*), that an appeal shall lie to the House of Lords from any order or judgment, either of the Court of Appeal in England, or of any of the Scotch or Irish Courts, from which error or an appeal lay thereto at or immediately before the commencement of the Act ; that is to say, the 1st November, 1876. Leave to appeal is unnecessary, whether the order appealed against is final or interlocutory (*f*) ; except in

(*a*) 36 & 37 Vict. c. 66, s. 20.

(*e*) *Ibid.* s. 3.

(*b*) *Ibid.* s. 21.

(*f*) *Ford's Hotel Co. v. Bart-*

(*c*) S. 2.

*lett* [1896] A. C. 1.

(*d*) 39 & 40 Vict. c. 59, s. 24.

the case of certain matrimonial causes (a), and in bankruptcy appeals (b). In these cases no appeal lies to the House of Lords without the leave of the Court of Appeal (c).

The practice in appeals to the House of Lords is governed by the Appellate Jurisdiction Acts, 1876 and 1887, and by the Standing Orders and Directions of the House. Every appeal is by way of *petition*, praying that the matter of the order or judgment appealed against may be reviewed before His Majesty the King in his Court of Parliament, and that the order or judgment may be reversed or varied. In theory, every member of the House of Lords has a right to be present and vote at the hearing of an appeal; but it is provided by the Act of 1876 (d) that no appeal may be heard and determined, unless there be present not less than three specially qualified peers, known as Lords of Appeal. This class of peers comprises:—the Lord Chancellor, the Lords of Appeal in Ordinary (presently to be mentioned), and such peers as have held 'high judicial office' (e).

With regard to the Lords of Appeal in Ordinary, it is enacted, by the Appellate Jurisdiction Act, 1876, that, in order to aid the House of Lords in the hearing and determination of appeals, His Majesty may appoint by patent two (now six) qualified persons (f), who shall hold office during good behaviour and notwithstanding the demise

(a) Judicature Act, 1881, ss. 9, 10. But see *Butchart v. Butchart* [1901] A. C. 266.

(b) Bankruptcy Act, 1883, s. 104.

(c) *Lane v. Esdaile* [1891] A. C. 210; *Re Lake* [1901] 1 K. B. 710; *Re Beauchamp* [1904] 1 K. B. 572.

(d) S. 5.

(e) That is to say, the Lord Chancellorship of Great Britain or of Ireland, a paid judgeship of the Judicial Committee, a judge-

ship of the High Court of Justice, or of the Court of Appeal, and the like. (Act of 1876, s. 25; Act of 1887, s. 5.)

(f) The qualification consists in having held 'high judicial office' (see last note) for not less than two years, or having been for not less than fifteen years a practising barrister in England or Ireland, or a practising advocate in Scotland. (Act of 1876, s. 6.) See also Appellate Jurisdiction Act, 1913, s. 1.

of the Crown, but who shall be removable on an address of both Houses of Parliament. Each of such Lords of Appeal is entitled during life to rank as a baron, and, even after his retirement or resignation (*a*), to a writ of summons to attend, and to sit and vote, in the House of Lords; but his dignity is not hereditary (*b*), though his children are entitled to the courtesy prefix of 'Honourable.' The House of Lords may sit as a court of appeal during the prorogation of Parliament, and even during the dissolution of Parliament; should His Majesty think fit, by writing under his sign manual, to authorise the Lords of Appeal to hold sittings during such dissolution (*c*).

II. *The Judicial Committee of the Privy Council*.—The constitution and powers of this body have been described in detail in a former part of this work (*d*). Here it is sufficient to say that, by virtue of the Appellate Jurisdiction Act, 1876, the Lords of Appeal in Ordinary now sit as members of the Judicial Committee; and that the two ultimate courts of appeal are therefore becoming largely, though not entirely, identical in composition. The Act of 1876 (*e*) directs that, subject to the due performance of his duties with regard to appeals in the House of Lords, it shall be the duty of a Lord of Appeal, if a privy councillor, to sit and act also as a member of the Judicial Committee. The same Act also provides (*f*), that His Majesty by Order in Council, with the advice of the Judicial Committee or any five of them (the Lord Chancellor being one), and of the archbishops and bishops who are members of the Privy Council (or any two of them), may make rules for the attendance, as *assessors* of the committee on the hearing of ecclesiastical cases, of such number of the archbishops and bishops of the

(*a*) Act of 1887, s. 2.

(*b*) Act of 1876, s. 6.

(*c*) *Ibid.* ss. 8, 9.

(*d*) See *ante*, vol. ii. pp. 582-584.

(*e*) S. 6.

(*f*) S. 14.

Church of England as may, by such rules, be determined (*a*).

An appeal to the Judicial Committee is brought by way of petition; and printed cases are lodged. The procedure resembles that in the House of Lords; but is regulated, not by Orders of that House, but by Orders in Council (*b*). The Committee, after hearing the parties, and taking time for deliberation, delivers a written judgment through the mouth of one of its members, in the form of reasons for humbly advising His Majesty to allow, or (as the case may be) dismiss, the appeal. Differences of opinion between the members of the Board are not officially recorded.

(*a*) See also Judicial Committee (Amendment) Act, 1895, and Appellate Jurisdiction Acts, 1908 and 1913.

(*b*) See *ante*, vol. ii. p. 580.

## CHAPTER XIII.

## OF PROCEEDINGS IN THE KING'S BENCH DIVISION.

WE now proceed to consider the manner in which the remedy by action is pursued in the High Court of Justice. And in this chapter we shall describe the ordinary procedure in an action in the King's Bench Division ; dealing in subsequent chapters separately with proceedings in the Chancery Division, and in the Probate, Divorce, and Admiralty Division.

*Commencement of action.*—An action in the King's Bench Division is commenced by the issue of a WRIT OF SUMMONS, by which the defendant is commanded to 'enter an appearance,' usually within eight days after service of the writ, and is warned that if he fails to do so judgment may be given in his absence. Before the writ is issued, the spaces left blank in the form of writ provided must be filled in by the plaintiff or his solicitor with the names and addresses of the parties to the action, and with a statement of the nature of the claim which the plaintiff makes against the defendant. In so doing, care has to be taken, and certain rules and considerations must be borne in mind ; otherwise the writ may have to be amended at the plaintiff's expense, or the defect may lead to the writ being set aside altogether, or to the failure of the subsequent proceedings based upon it.

*Parties.*—In naming the parties to the action, care has to be taken to select the proper persons. For example, if the action is brought for breach of a contract made by several persons jointly (such as executors under a will or trustees under a settlement), all who are living must

be joined as co-defendants; and, if all have died, the personal representatives of the last survivor must be sued. If the contract sued on is *joint* and *several*, the plaintiff may sue one or more or all in the same action, including the personal representatives of any deceased party to the contract. In actions for *tort* committed by two or more persons jointly, the plaintiff may sue and recover judgment for the whole of his damages against one or more or all of the wrong-doers.

All persons may be joined in one action as plaintiffs in whom any right to relief in respect of or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where, if such persons brought separate actions, any common question of law or fact would arise (*a*). And all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative (*b*). But where there are numerous persons having the same interest in one cause or matter, one or more of such persons *may* sue or be sued, or may be authorised by the Court or a Judge to defend such cause or matter, on behalf or for the benefit of all persons so interested (*c*).

If a person sues or is sued in a representative capacity, such as the trustee of a bankrupt or the personal representative of a deceased person, the fact must be stated in the writ. If a woman is the plaintiff, the writ should state whether she is a wife, a widow, or a spinster. A married woman may sue or be sued as if she were

(*a*) Ord. XVI. r. 1; *Oxford & Cambridge Universities v. Gill* [1899] 1 Ch. 55; *Drincoquier v. Wood* [1899] 1 Ch. 393; *Ellis v. Duke of Bedford* [1901] A. C. 1.

(*b*) Ord. XVI. r. 4. But the causes of action must be the same. (*Sadler v. Gt. Western*

*Ry. Co.* [1896] A. C. 450; *Munday v. South Metropolitan Electric Light Co.* (1913) 29 T. L. R. 346; and see *post*, p. 540.)

(*c*) Ord. XVI. r. 9; *Janson v. Property Ins. Co., Ltd.* (1913) 30 T. L. R. 49.

unmarried (a), and can be made liable to the extent of her separate estate, if any. She should be described as 'A. B., wife of C. B.' A person who has a cause of action against a married woman may be able to sue her husband alone, or as co-defendant with her (b). A husband is liable to the full extent for any tort committed by his wife during marriage, and is liable to the extent of any property he has acquired through her on any contract or tort made or committed by her before marriage (c). But he is not liable after a judicial separation (d). On a contract made by her during marriage, both cannot be made liable; because either the contract was made by her as agent for her husband (in which case he alone is liable), or was made on her own behalf (in which case she alone is liable) (e).

An infant plaintiff must sue by his next friend, who is personally liable for any costs the plaintiff may have to pay; but an action may be commenced against an infant without describing him as such. An appearance is then entered for him by his guardian *ad litem*, who, as a rule, is not ordered to pay costs. Any person not under disability, and not having any interest in the action adverse to the infant, can act as next friend or guardian *ad litem* (f).

A person who has been found to be a lunatic by inquisition sues and is sued by his committee; the lunatic and the committee both being made parties, and being properly described. A person of unsound mind, not so found, sues by his next friend, and appears by his guardian

(a) Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1.

(b) *Beck v. Pierce* (1889) 23 Q. B. D. 316.

(c) *Seroka v. Kattenburg* (1886) 17 Q. B. D. 177; *Earle v. Kingscote* [1900] 2 Ch. 585; *Burdett v. Horne* (1911) 27 T. L. R. 402. (See *ante*, vol. ii., pp. 423-425.)

(d) *Cuenod v. Leslie* [1909] 1 K. B. 880, C. A.

(e) There is a possible third case; e.g. where a married woman professes, but without authority, to act as her husband's agent. In this case neither is liable (*Paquin v. Holden* [1906] A. C. 148).

(f) Ord. XVI. rr. 16, 18 and 19.

*ad litem*, as in the case of an infant (a). Partners may sue or be sued in the firm name (b); and a corporation or registered company in its corporate name.

*Indorsement of claim.*—The nature of the plaintiff's claim must be *indorsed* on the writ. There are four different kinds of indorsement; namely, a *general* indorsement, a *special* indorsement, an indorsement *for trial without pleadings*, and an indorsement of claim *for an account*. In every case the writ may be *generally* indorsed, whatever be the nature of the claim; and this form of indorsement is more frequently used than any other. A general indorsement consists of a very short statement of the nature of the claim made or the relief required in the action (c); e.g., "the plaintiff's claim is "for damages for breach of contract," for "damages "for slander," "for £     for the price of goods sold," "for arrears of rent," "for work done as a surveyor," "for the carriage of goods" (d). Thus, a general indorsement has been aptly described as "merely a label "to show to what class of action the suit belongs" (e).

A special indorsement can be used in certain cases only, and need not necessarily be used in any case. The cases in which it may be used are, first, where the claim is for a debt or liquidated sum of money arising out of any contract, express or implied, or arising on a trust or statute; or, secondly, where the claim is by a landlord to recover land from his tenant (f). Thus, a claim for unliquidated damages cannot be specially indorsed, nor a claim for interest in the nature of damages (g). But a claim for interest may be added to a specially indorsed claim, if the interest is payable by the contract or by

(a) Ord. XVI. r. 17.

(b) Ord. XLVIII. A, r. 17.

(c) Ord. III. rr. 2 and 3.

(d) See the Forms of Indorsement in App. A, Part iii., in the White Book.

(e) See Odgers, *Procedure* (5th

edn.), p. 36.

(f) Ord. III. r. 6.

(g) *Sheba Gold Mining Co. v. Trubshawe* [1892] 1 Q. B., at p. 682; *Wilks v. Wood*, *ibid.*, at p. 687.



statute; as, for example, under the Bills of Exchange Act, 1882, which enables interest to be claimed, not merely to the date of the writ, but also till payment or judgment (a). A special indorsement is a statement of claim; and no further statement of claim can be delivered after it except by way of amendment (b). Hence, a special indorsement must state concisely all the material facts necessary to constitute the cause of action relied on, and must contain full particulars sufficient to enable the defendant to make up his mind whether to admit liability or to resist the claim (c). It must be drawn in the form of a pleading under the heading of the words 'Statement of Claim,' and be signed by the solicitor or counsel who drafted it.

The main advantage of a specially indorsed writ is: that if the defendant enters an appearance, the plaintiff may apply to the Master by summons for summary judgment under Order XIV. In support of his application, the plaintiff must make an affidavit verifying the cause of action, and stating that in his belief there is no defence to the action. The summons, with the affidavit, must be served at the defendant's address for service four clear days before the day named for the hearing of the summons. If, on the hearing of the summons, it appears to the Master that there is no defence, he will make an order empowering the plaintiff to enter final judgment for the amount claimed, or for the recovery of the land, as the case may be, and costs. If the defendant has any defence to the action, he may, and generally does, make an affidavit showing cause against the plaintiff's application. In these circumstances, the Master, unless

(a) *London & Universal Bank v. Clancarty* [1892] 1 Q. B. 689; *Lawrence v. Willcocks*, *ibid.*, 696; *Dando v. Boden* [1893] 1 Q. B. 318.

(b) *Gold Ores Reduction Co. v. Parr* [1892] 2 Q. B. 14; Ord.

XX. r. 1. (As to amendment, see *post*, p. 537.)

(c) *Walker v. Hicks* (1877) 3 Q. B. D. 8; *Smith v. Wilson* (1879) 5 C. P. D. 25; *Frühauß v. Grosvenor Co.* (1892) 67 L. T. 350.

satisfied that the alleged defence is a sham, set up merely for the purpose of delay, or that the facts alleged by the defendant do not amount to a defence in law, should give leave to defend as to the whole or part of the claim to which the defence goes (a). Leave to defend may be unconditional, or conditional on the defendant giving security or paying money into court; but where there is a triable issue of fact or a doubtful point of law to be decided, the defendant is, as a rule, entitled to unconditional leave to defend; although the Master may think that the defence is not likely to succeed (b). The conditions of bringing money into court or giving security ought only to be imposed where the defence set up is so vague and unsatisfactory, that the Master is practically certain that there is no defence, but has sufficient doubt to enable him to exercise his discretion in giving leave to defend subject to the conditions, instead of making an order for judgment (c).

Where the defendant has no defence to the claim, but sets up a plausible counterclaim, judgment is sometimes given for the plaintiff on the claim, with a stay of execution as to so much of the claim as is covered by the counterclaim, till the trial of the counterclaim (d). But if part of the claim only is admitted, and the counterclaim is for a larger amount, the plaintiff is, as a rule, not entitled to any judgment till the trial (e).

The third kind of indorsement is for an account; and in all cases in which the plaintiff desires to have an account taken in order to ascertain how much the

(a) *Jacobs v. Booth's Distillery Co.* (1901) 85 L. T. 262.

(b) *Ibid.*

(c) *Ibid.* (Older cases suggest that these conditions may be applied where there is something suspicious in the defendant's mode of presenting his defence. See *Lloyd's Banking Co. v. Ogle*

(1876) 1 Ex. D. 262; *Ward v. Plumbley* (1890) 6 T. L. R. 198.)

(d) *Slater v. Cathcart* (1891) 8 T. L. R. 92.

(e) *Court v. Sheen* (1891) 7 T. L. R. 556; and see *Yearly Supreme Court Practice* (1914) p. 131.

defendant owes him, he ought to indorse the writ with a claim that such account be taken (a). Unless there is some preliminary question to be tried (b), the Master will, on the plaintiff's application, order an account to be taken by a Master, a District Registrar, or by an official or special referee under the Arbitration Act, 1889 (c). In these circumstances, the defendant may be ordered to deliver an account, which the plaintiff may after investigation 'falsify,' by showing that the defendant has taken credit for payments which he never made, or 'surcharge,' by showing that the defendant has received sums of money for which he has not given credit. When the disputed items in the account have been disposed of, an order can be made that the defendant pay the balance shown by the correct account to be due to the plaintiff. But claims for account are more frequent in the Chancery Division than in the King's Bench Division; and a fuller description of the process of passing accounts under the supervision of the court will be found in the following chapter (d).

The fourth kind of indorsement is for trial without pleadings (e). This indorsement must contain a statement sufficient to give the defendant notice of the nature of the claim, and that, if the defendant appears, the plaintiff intends to proceed to trial without pleadings. This form of indorsement is rarely used; for it exposes the plaintiff to the disadvantage of not knowing what defence the defendant may set up at the trial.

*Different causes of action.*—A writ may be indorsed with more than one cause of action against the defendant. As a general rule, the plaintiff may join on his writ any number of different causes of action against the same defendant; but if they cannot be conveniently tried together the Court may order any of them to be tried

(a) Ord. III. r. 8.

(c) Ss. 13, 14.

(b) Ord. XV. r. 1; Ord.

(d) See *post*, pp. 598-604.

XXXIII. r. 2.

(e) Ord. XVIII. A.

separately (a). But this does not mean that a very large number of different causes of action should be joined in one writ ; and, if this is done, the Court may limit the action to some of the causes (b).

Claims by plaintiffs jointly may be joined with claims by them or any of them separately against the same defendant (c). But alternative inconsistent claims by several plaintiffs against the same defendant will not be allowed (d) ; and a personal claim by a plaintiff joined with one on behalf of himself and other shareholders of a company has been held bad (e).

Claims against several defendants in respect of separate torts cannot be joined in one action (f) ; though it is otherwise where the claims are in respect of the same tort (g). Nor can a claim for a separate tort against one of several defendants be joined with a claim for a joint tort against some or all of them (h) ; and the joinder of a claim by a plaintiff against two or more defendants jointly in respect of the same tort with a claim in the alternative against one or other of the defendants, has sometimes been held to be bad (i).

(a) Ord. XVIII. rr. 1, 8. (No cause of action may (unless by leave of the court or a judge) be joined with an action to recover land, other than a claim for mesne profits or arrears of rent or double value, or for damages for breach of contract under which the land is held, or for any wrong or injury to the premises claimed. Ord. XVIII. r. 2.) Claims by a trustee in bankruptcy, as such, may not, except by leave of the court or a judge, be joined with any claim by him in any other capacity. (Ord. XVIII., r. 3.)

(b) *Saccharin Corporation v. Wild* [1903] 1 Ch. 410.

(c) Ord. XVIII., r. 6.

(d) *Smith v. Richardson* (1878)

4 C. P. D. 112.

(e) *Stroud v. Lawson* [1898] 2 Q. B. 44.

(f) *Sadler v. Gt. Western Ry. Co.* [1896] A. C. 451.

(g) *Walters v. Green* [1899] 2 Ch. 696.

(h) *Gower v. Couldridge* [1898] 1 Q. B. 348 ; *Pope v. Hawtrey* (1900) 85 L. T. 263.

(i) *Thompson v. London County Council* [1899] 1 Q. B. 840 ; *Frankensburg v. Gt. Horseless Carriage Co.* [1900] 1 Q. B. 504, C. A. On the other hand, see *Bullock v. London General Omnibus Co.* [1907] 1 K. B. 264 ; and *Compania Sansinena de Carnes Congeladas v. Houlder Bros.* [1910] 2 K. B. 354.

*Issue of writ.*—The next step after settling the contents of the writ is to issue it. For this purpose two forms must be filled up and taken to the writ department of the Central Office, or to a District Registry, where they are marked in the top right-hand corner with a letter and number of identification, and are sealed by the officer. One of the forms is stamped with an impressed stamp for ten shillings, and filed by the officer; the other is not stamped, but is sealed and returned to the person issuing it, and becomes the writ in the action. It is not necessary to obtain leave to issue a writ, except when the plaintiff desires to join on his writ several causes of action which cannot be joined without leave (*a*) (*e.g.* where the plaintiff in an action for recovery of land wishes to join some other cause of action with it), or where the writ is issued for service out of the jurisdiction (*b*).

Leave to issue a writ for service outside England or Wales must first be obtained on application made to the judge in chambers. The judge has no power to give leave except in one or other of the following cases (*c*): viz. when (1) the whole subject-matter of the action is land within the jurisdiction, or relates to any act, deed, will, or liability affecting such land; or (2) the defendant is a person domiciled or ordinarily resident within the jurisdiction; or (3) the action is for the administration of the personal estate of any person who at his death was domiciled within the jurisdiction, or for the execution of any trust in writing as to property within the jurisdiction which ought to be executed according to English law; or (4) where the action is founded on the breach within the jurisdiction of any contract, wherever made, which by its terms ought to be performed within the jurisdiction, but this does not apply when the defendant is domiciled or ordinarily resident in Scotland or Ireland; or (5) where an

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| (a) Leave may be obtained                | by affidavit.      |
| from the Master in chambers, on          | (b) Ord. II. r. 4. |
| an <i>ex parte</i> application supported | (c) Ord. XI. r. 1. |

injunction is sought as to anything to be done within the jurisdiction, or any nuisance within the jurisdiction is sought to be prevented; or (6) where any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction. The application for leave must be supported by affidavit verifying the cause of action, and stating the grounds of the application, and where the defendant is, and whether he is a British subject.

*Service of writ.*—The next step after issuing the writ is to serve it on the defendant. Unless the defendant's solicitor undertakes, as is the usual course, to accept service on his behalf, the writ must, as a rule, be served personally on the defendant, by handing him a copy of the writ and showing him the original if he asks to see it. When prompt personal service is impossible, leave may be obtained from the Master for 'substituted service,' i.e. service on the defendant's agent, or by advertisement, or by sending the defendant a copy of the writ in a registered letter, or by some mode of bringing the issue of the writ to the defendant's knowledge otherwise than by personal service (a). The application for substituted service must be supported by an affidavit stating the grounds on which it is made.

*Appearance to writ.*—After service of the writ, the defendant must enter an appearance, by delivering at the Central Office, or the District Registry out of which the writ was issued, a memorandum in writing containing the name of his solicitor, or a statement that he defends in person, and giving his address for service of notices or other documents in the action. The defendant must, on the same day, give notice of his appearance to the plaintiff's solicitor.

If the defendant does not enter an appearance within the time stated in the writ, the plaintiff may, after filing an affidavit of service, enter judgment against the

(a) Ord. IX. r. 2; Ord. X.

defendant. Where the writ, whether generally or specially indorsed, is for a debt or other liquidated sum of money, the judgment is final; but where the claim is for unliquidated damages or for the recovery of a chattel, the judgment is 'interlocutory,' and an order is made for the assessment of the damages or the value of the chattel by a Master or official referee, or by a jury summoned upon a writ of inquiry addressed to the sheriff. After interlocutory judgment has been entered, the defendant cannot deny his liability; but he may dispute the amount for which he is liable, and for that purpose attend in person or by solicitor or counsel, and give evidence, if he chooses, as to the assessment of the damages. The plaintiff may sign final judgment for the amount of the damages so assessed (a). If the action is for the recovery of land, the plaintiff may, in default of appearance, enter judgment for recovery of possession.

In any case in which judgment has been entered in default of appearance, the Court has a discretionary power to set aside the judgment on such terms as it may think fit (b). The application to set aside may be made by the defendant by summons before a Master, or District Registrar, where the judgment was signed in a District Registry, and must be supported by an affidavit stating the circumstances under which the default arose, and disclosing the nature of his defence. The Master, if he grants the application, generally does so on the terms that the defendant shall pay all costs occasioned by his default, including the costs of the application to set aside (c); unless the judgment was obtained irregularly, in which case the defendant is, as a rule, entitled *ex debito justitiæ* to have it set aside (d).

(a) Ord. XIII.

(b) *Ibid.* r. 10; Ord. XXVII.  
r. 15.

(c) *Wright v. Mills* (1889) 60  
L. T. 887.

(d) *Anlaby v. Prætorius* (1888)

20 Q. B. D. 764; *Hughes v. Justin* [1894] 1 Q. B. 667; *Muir v. Jenks* [1913] 2 K. B. 412.  
(But see *Armitage v. Parsons* [1908] 2 K. B. 410.)

Where the action is of such a nature that it could only have been formerly brought in the Court of Chancery—as, for example, where the writ is indorsed with a claim for an injunction—the plaintiff cannot enter judgment in default of appearance, but must file a statement of claim in the Writ Department, and proceed with the action as if the defendant had appeared (*a*). In default of appearance and defence, the statement of claim will stand as admitted ; and the plaintiff can move for such judgment as he is entitled to on the facts therein alleged.

*Summons for directions.*—If the defendant enters an appearance, the next step in the action is for the plaintiff to take out a summons. The nature and object of the summons depend to some extent upon the indorsement on the writ. In all cases where the writ is ‘generally’ indorsed, the plaintiff must, within fourteen days after the defendant’s appearance, take out a summons for directions under Order XXX. If he neglects to do so, an application may be made by the defendant to dismiss the action for want of prosecution ; and the Master may, on such application, either dismiss the action, or, as is more usual, give directions as if the application were a summons for directions (*b*). When the writ has been ‘specially’ indorsed, the plaintiff may, as has been already explained, apply for summary judgment under Order XIV. ; or he may take out a summons for directions under Order XXX., or he may, without taking out either kind of summons, wait until the time has expired for delivering a defence to the statement of claim indorsed on the writ (*c*), and then sign final judgment in default of defence (*d*). If a summons is taken out under Order XIV., and leave is given to defend, the Master has power to give, and generally does give, all such directions as might be given on a summons for directions under Order XXX. If no summons is taken out, and a defence is delivered,

(*a*) Ord. XIII. r. 12.

(*c*) Ord. XXI. r. 6.

(*b*) Ord. XXX. r. 8.

(*d*) Ord. XXVII. r. 2.



application must then be made, on a summons for directions, to fix the place and mode of trial.

On a summons for directions in chambers, the Master decides how the action is to be conducted by the parties after the defendant's appearance until the trial and judgment. The original summons requires a ten shilling stamp. At the first hearing all the necessary directions as to the future conduct of the action are not usually given; because the parties probably do not know, at so early a stage in the proceedings, what will afterwards be required. The summons may therefore be restored to the Master's list by either party, without additional fee, for further directions, on two clear days' notice of the intended application being given to the other side (a). The matters usually dealt with on a summons for directions are pleadings, place and mode of trial, and discovery, leaving other interlocutory matters to be raised subsequently by notice under the summons. These enumerated matters require separate consideration.

*Pleadings.*—After the defendant has entered an appearance, neither party can deliver any pleading without an order of the Master. On the first hearing of the summons for directions, an order is usually made for the delivery by the plaintiff of a statement of claim, unless the writ has been specially indorsed, and for the delivery by the defendant of a defence. The main objects of pleadings are, to ascertain what are the questions of fact or law at issue between the parties, and to give each party notice of the case which the other intends to set up at the trial. To attain these objects, certain rules of pleadings have been provided, of which the fundamental rule is, that every pleading shall contain only a statement in a summary form of the material facts on which the party pleading relies for his claim or defence as the case may be, and not the evidence by which it is to be proved (b).

The first essentials of a good pleading are, therefore,

(a) Ord. XXX. r. 5.

(b) Ord. XIX. r. 4.

clearness of statement and brevity. It should be concise and also precise. It must state facts and not law; and must only set out material facts essential to making out the cause of action or defence relied on. Neither party need allege in any pleading any fact which the law presumes in his favour, or as to which the burden of proving the contrary lies on the other side (*a*). The pleading ought not to set out any circumstances which merely tend to prove the truth of the material facts alleged. As to the form of pleadings, the rules provide that a pleading must be divided into paragraphs numbered consecutively, and if it contains less than ten folios (720 words) it may be written, but if ten folios or more it must be printed. All sums, dates, or numbers must be expressed in figures and not in words. The pleading, if settled by counsel, must be signed by him; and if not so settled, it must be signed by the solicitor, or by the party, if he sues or defends in person (*b*).

*Statement of claim.*—The STATEMENT OF CLAIM must set out the material facts on which the plaintiff bases his claim, and the precise remedy or relief which he seeks to obtain (*c*). As the general indorsement on the writ does not require a statement of the precise ground of complaint; or the precise remedy or relief to which the plaintiff considers himself entitled (*d*), the claim may be extended or modified by the statement of claim without amending the indorsement on the writ (*e*). The different kinds of remedy or relief which may be claimed are damages, possession, mesne profits, arrears of rent, delivery up of a chattel, specific performance or an injunction, the setting aside or rectification of a written instrument, a mere declaration of the plaintiff's rights, or an account; according to the nature of the cause of action. In a proper case, these remedies may be claimed in the alternative, or by way of cumulative relief.

(*a*) Ord. XIX. r. 25.

(*b*) Ord. XXX. rr. 9, 10, 11.

(*c*) Ord. XX. r. 6.

(*d*) Ord. III. r. 2.

(*e*) Ord. XX. r. 4.

*Damages.*—This is the most usual remedy granted in an action in the King's Bench Division. Damages are general or special, according to their nature ; liquidated or unliquidated, according to the mode of their assessment ; and nominal, substantial or vindictive, according to their amount. 'General damage' is the loss or injury which the law presumes is suffered by a person whose absolute right has been infringed, such as the right to performance of a contract, which is infringed by the other party to the contract committing a breach of it, or the right to personal safety or freedom, which is infringed by assault or battery or false imprisonment, or the right to reputation, which is infringed by the publication of a libel, or the right to exclusive and undisturbed possession of property, which is infringed by any act amounting to a trespass. In all these cases, the law presumes that some injury has been suffered by the plaintiff whose right has been infringed ; and it is therefore unnecessary for him to allege such damage in his statement of claim, or prove it at the trial. 'Special damage' (a), on the other hand, is damage which he must allege in his pleading and prove at the trial. It consists of some particular loss or injury which he has suffered in consequence of the defendant's breach of duty, and which the law will not presume as damage in the natural course of events happening to any person whose right is similarly infringed. Special damage, if suffered, must therefore be alleged with sufficient particulars to give the defendant notice of the nature and extent of the loss sustained ; otherwise the plaintiff will not be allowed to give evidence of such loss at the trial. In some cases, the fact that special damage has been suffered is essential to give the plaintiff a right of action ; and in such cases it must therefore be pleaded as one of the material facts necessary to constitute a good cause of action. Thus, in an action of negligence,

(a) See, however, *ante*, pp. 314–315, where the terms 'general' and 'special' are used to signify

two subdivisions of what is here called 'special damage.'

or of deceit, or malicious prosecution, or of slander not actionable *per se*, or in an action brought by a private individual in respect of a public nuisance, the statement of claim would not disclose any cause of action without an averment of some actual loss or injury sustained by the plaintiff by reason of the acts or omissions complained of.

Damages are 'liquidated' or 'made clear' where they have been fixed by agreement between the parties, or can be fixed by calculation on a basis agreed upon by them. But a sum mentioned in a contract to be paid for a breach as 'liquidated damages' may be construed by the court as a *penalty* (a); and, in that event, either more or less than the amount so stated may be recovered as damages. Damages are 'unliquidated,' where the amount has not been fixed by the parties, but has to be assessed in the action. When the damages are unliquidated, the amount claimed or recovered may be nominal, substantial, or vindictive. 'Nominal damages' may be awarded where the plaintiff has brought the action, not for the purpose of putting money into his pocket, but merely to establish the existence of the right infringed by the defendant, or to clear his character from defamation, or where he has not suffered any actual loss from the breach of duty complained of. 'Substantial damages' may be awarded to compensate the plaintiff for the loss or injury which he has in fact sustained. 'Vindictive' or 'exemplary damages' may be awarded in such actions as those for breach of promise of marriage, seduction, assault, false imprisonment, malicious prosecution, libel, slander, or trespass; to punish the defendant by condemning him in an amount of damages in excess of that which would adequately compensate the plaintiff for the actual loss or injury suffered. If the amount of damages claimed is mentioned in the statement of claim, the plaintiff cannot recover any sum in excess of the amount claimed, unless the Judge gives leave to

(a) *Kemble v. Farren* (1829) 6 Bing. 141; *Rayner v. Condor* [1895] 2 Q. B. 289. (See *ante*, p. 313.)

amend the claim, which he will do in a proper case (a). In practice, any facts in aggravation of damages may be set out in the statement of claim (b).

*Possession*.—In an action for the recovery of land the plaintiff usually claims possession, mesne profits till delivery of possession, and arrears of rent, if any ; and, as has been said, he may also add a claim for damages for breach of any contract under which the land was held, or damages for any injury to the land (c).

*Delivery of chattel*.—In an action for the detention of a chattel, the claim is generally for the delivery up of the chattel, or payment of its value, and damages for its detention. The plaintiff now has the option, which the defendant in an action of detinue formerly had, of electing whether to get the chattel returned to him or payment of its value (d).

*Equitable relief*.—The plaintiff may claim specific performance of a contract, or an injunction to restrain a breach of contract or the commission of a tort, or a receiver of the incomings of any property, or the rectification or setting aside of any written instrument ; because, although these forms of relief are more commonly granted in actions brought in the Chancery Division, every kind of equitable relief may now be claimed in an action in the King's Bench Division (e).

*Declaratory judgment*.—The plaintiff may claim a declaration of his rights ; as, for example, that he has a lien on certain property.

*Account*.—The plaintiff may claim that an account be taken for the purpose of ascertaining the amount of the balance due to him from the defendant, or the amount of

(a) *Chattell v. The Daily Mail* 246.  
(1901) 18 T. L. R. 165.

(b) *Millington v. Loring* (1880)  
6 Q. B. D. 190.

(c) Ord. XVIII. r. 2.

(d) Ord. XLVIII. And see  
*Hymas v. Ogden* [1905] 1 K. B.

(e) Jud. Act, 1873, s. 24 (1).  
(Claims for an injunction or receiver may now be made by interlocutory application (*ibid.* s. 25 (8)).)

profits which the defendant has made out of the transactions complained of by the plaintiff (a).

*Defence.*—Within ten days from the delivery of the statement of claim, if no other time is specified in the order (b), the defendant must deliver his DEFENCE; otherwise the plaintiff may enter judgment or move for judgment, in the same way as he would have been entitled to do if the defendant had failed to enter an appearance (c). After receiving the statement of claim, and before delivering his defence, the defendant may apply to the Master to strike out the statement of claim, on the ground that it is clearly vexatious, or discloses no cause of action; or to order the plaintiff to give further and better particulars of matters alleged in a general way in the statement of claim. If the defect objected to in the statement of claim is capable of being cured by amendment, the claim will not, as a rule, be struck out; but leave will be given to amend, usually on the terms of the plaintiff paying the costs occasioned by the defect in his pleading. Particulars may be ordered in all cases on such terms as to costs as the Master thinks just (d); their object is to narrow the issues of fact so as to save expense, or bind the party giving the particulars to definite details or incidents, or to explain vague or general allegations in the pleading which cannot be properly answered by the other side without more specific information. Thus, particulars must always be given by a party who relies on any misrepresentation, or fraud, or negligence, or any general charge of misconduct, or who claims special damage (e).

In settling the defence, the main rules of pleading to be borne in mind are: that it is not sufficient for the defendant merely to deny his liability generally, but that he

(a) *Lever v. Goodwin* (1887) 36 Ch. D. 1.

(b) Ord. XXI. r. 8.

(c) Ord. XXVII. rr. 2, 4, 7, and 11.

(d) Ord. XIX. r. 7.

(e) *Ibid.* r. 6; *Wallingford v. Mutual Society* (1880) L. R. 5 App. Ca. 685. (And see *Wootton v. Sievier* (1913) 29 T. L. R. 596).

must deal specifically with every allegation of fact in the statement of claim of which he does not admit the truth (a); and that he is taken to admit every material fact alleged in the statement of claim, unless he denies it, specifically or by implication, or states that he does not admit it (b). To these rules there is an important exception, that no denial as to damages is necessary; for an allegation of general or special damage is deemed to be put in issue in all cases, unless expressly admitted (c).

In answering the statement of claim, the defendant may take one or more of the following courses. He may deny every allegation of fact made in the statement of claim. This is called a *traverse*. He may admit the facts alleged, or any of them, and avoid or alter their effect by stating other facts. This is called *confession and avoidance*. For example, if the action is for breach of contract, the defendant may admit the contract, and plead by way of avoidance that the contract was subsequently rescinded, or was performed, or was illegal, or is not enforceable by reason of infancy, fraud, the Gaming Acts, the Limitation Act, or the Statute of Frauds. All equitable or statutory defences must be specially pleaded. The defendant may, in the third place, say that, even assuming the facts alleged in the statement of claim are true, they do not entitle the plaintiff to the relief or remedy claimed. This is called an *objection in point of law*; and the object of raising it is that the defendant may apply for an order that the question of law be tried as a preliminary point before the trial of the other issues in the action (d).

*Payment into court.*—In an action for debt or damages, the defendant may, before or at the time of delivering his defence, or at any later time by leave, pay into court a sum of money by way of satisfaction, which is taken to

(a) Ord. XIX. r. 17.

(b) *Ibid.* r. 13.

(c) Ord. XXI. r. 4.

(d) Ord. XXV. rr. 2 and 3.

(Formerly such objections were raised by way of *demurrer*, which was separately heard.)

admit the claim or cause of action, to the extent to which the payment in is made (a); or the defendant may pay money into court with a defence denying liability, except in actions or counter-claims for libel or slander (b). Notice must be given by the defendant to the plaintiff where payment is made before defence (c); and the payment in must be signified in the defence (d), whether paid in before or with the defence. Where money is paid in before defence, or without a denial of liability, the plaintiff may have the money paid out to him, unless the Court otherwise orders (e); and, if not satisfied with the amount, may continue the action to recover the balance of his claim. Where the money is paid in with a denial of liability, the plaintiff may accept it in full satisfaction of his claim; and, after notice to the defendant of acceptance, may tax and recover payment of his costs (f). If he does not accept the sum paid in, but proceeds with the action, he will, as a rule, if he does not succeed in obtaining judgment for more than the amount paid in, be ordered to pay the defendant's costs incurred subsequent to the date of payment in. If he recovers less than the amount paid in, the balance will be repaid to the defendant (g). If, before action brought, the defendant has offered to pay the amount claimed, he may plead the *tender*; and, if so, must pay into court the sum so tendered (h). If the plea is upheld at the trial, the defendant will be entitled to his costs of the action.

*Set-off*.—Where the claim is for a debt or other liquidated amount, the defendant may, under the Statutes of Set-off (i), set up any cross-claim for debt arising out of the

(a) Ord. XXII. r. 1.

(b) *Fleming v. Dollar* (1889) 23 Q. B. D. 388; *Oxley v. Wilkes* [1898] 2 Q. B. 56; *Kinnell v. Walker* (1911) 27 T. L. R. 257.

(c) Ord. XXII. r. 4.

(d) Ord. XXII. r. 2.

(e) Ord. XXII. r. 5. And see

*Gray v. Bartholomew* [1895] 1 Q. B. 209.

(f) Ord. XXII. r. 6.

(g) *Ibid*.

(h) *Ibid*. r. 3.

(i) 2 Geo. 2 (1728) c. 22; and 8 Geo. 2 (1734) c. 24 (repealed by S. L. R. 1883; but see s. 7



same transaction as the claim. Where the set-off is established, it operates as a good defence to the action, if it is not less than the amount of the claim; and it reduces, *pro tanto*, the amount of the judgment if it is less than the claim. But if it exceeds the amount of the claim, the defendant cannot recover the balance in that action. Claims cannot be the subject of set-off, unless they exist between the same parties and in the same right. For instance, to a claim by a plaintiff in a representative capacity, a debt due from the plaintiff personally may not be set off (a). But a defendant can set off a debt originally due from the plaintiff to a third party, which has been assigned to the defendant (b). Set-off is a defence, and should be so pleaded as such (c).

*Counter-claim.*—The defendant may admit the plaintiff's claim in his defence, subject to a COUNTER-CLAIM; or he may dispute the claim in the defence and also set up a counter-claim. A counter-claim is in the nature of a cross-action, which the defendant is entitled, under the Judicature Act, 1873 (d), to set up against the plaintiff, to the same extent as if he had brought a separate action against the plaintiff for the purpose. The subject-matter of the counter-claim need not be of the same nature as the claim; nor need it even arise out of the same transaction, or have any relation or analogy to it. Any cause of action or claim of any nature or amount, which the defendant may have against the plaintiff, may be set up by way of counter-claim, subject to the plaintiff's right to raise the objection that the claim made by the defendant cannot be conveniently tried by the same court or at the same time as the plaintiff's claim, and ought to be

of that Act); Ord. XIX. r. 3. As to the limits of the right of set-off, see *Lister v. Hooson* (1907) 24 T. L. R. 162.

(a) *Stumore v. Campbell* [1892] 1 Q. B. 314; *In re Gedney* [1908] 1 Ch. 804.

(b) *Bennett v. White* [1910] 2 K. B. 643.

(c) *Stooke v. Taylor* (1880) 5 Q. B. D. 569; *Gathercole v. Smith* (1881) 7 Q. B. D. 626.

(d) S. 24 (3).

disposed of in an independent action. On this ground, the Master has power to strike out the counter-claim, and leave the defendant to bring an independent action (a). What is pleaded in the defence as a set-off may also be set up by way of counter-claim.

For most purposes, the claim and counter-claim are treated as independent actions, combined for the purpose of determining all the matters in difference between the parties (b). Thus, if the plaintiff discontinues his claim, the defendant is still entitled to proceed with the counter-claim (c). Where the defendant recovers more on the counter-claim than the plaintiff recovers on the claim, the Court has a discretion to order judgment to be entered for the defendant for the balance (d). But, as a rule, where the plaintiff succeeds on the claim and the defendant succeeds on the counter-claim, judgment should be entered for the plaintiff on the claim with costs, and for the defendant on the counter-claim with costs (e). Where both plaintiff and defendant fail, judgment is entered for the defendant on the claim with costs, and for the plaintiff on the counter-claim with costs; the costs to be set off (f). The same rules as to pleading and particulars apply to a counter-claim as to a statement of claim.

*Third-party notice.*—The defendant may, before delivering the defence, apply *ex parte* to the Master for leave to issue a 'third-party notice' against a third person who is not a party to the action, on the ground that he is entitled to contribution from such person towards part of the plaintiff's claim, or that he is entitled under a contract, express or implied, with the third party, to

(a) Ord. XXI. r. 15; Ord. XIX. r. 3. And see *Gray v. Webb* (1882) 21 Ch. D. 802; *Fendall v. O'Connell* (1885) 52 L. T. 538; and *South African Republic v. La Compagnie* [1897] 2 Ch. 487.

(b) *Stooke v. Taylor* (1880) 5 Q. B. D. 569.

(c) Ord. XXI. r. 16; *Adams v. Adams* [1892] 1 Ch. 369.

(d) Ord. XXI. r. 7; *Shrapnel v. Laing* (1888) 20 Q. B. D. 334.

(e) *Sharpe v. Haggith* (1912) 106 L. T. 13.

(f) *James v. Jackson* [1910] 2 Ch. 92.

be indemnified in respect of his liability to the plaintiff (*a*). The object of third-party procedure is to avoid multiplicity of actions ; and it is only intended to apply to clear cases of contribution or indemnity, where all the questions between the parties can be conveniently decided in one action (*b*), and where the defendant's right against the third person is solely dependent on his liability to the plaintiff (*c*). The plaintiff against whom a counter-claim has been set up, may issue a third-party notice against a person from whom he claims contribution or indemnity in respect of the counter-claim (*d*). If leave is given to issue such notice, a copy must be served on the third party, according to the rules relating to the service of writ of summons, together with a copy of the statement of claim, or, if there is none, then with a copy of the writ in the action (*e*). The third party must enter an appearance if he disputes the plaintiff's claim against the defendant, or his own liability to the defendant (*f*). After the third party has entered an appearance, the defendant must apply to the Master for directions ; and the Master, if satisfied that there is a question proper to be tried as to the liability of the third party, may give directions as to the trial of such question (*g*). But he may refuse to do so, and in effect strike the third party out of the action, if the question of liability is complicated, or if its introduction into the action will embarrass the plaintiff (*h*).

*Reply*.—After delivery of the defence, the plaintiff can only deliver a REPLY by leave (*i*), which will not be given unless he wishes to set up some additional facts by way of confession and avoidance of the defence, or to raise an

(*a*) Ord. XVI. r. 48.

(*b*) *Baxter v. France* [1895] 1 Q. B. 455.

(*c*) *Wynne v. Tempest* [1897] 1 Ch. 110.

(*d*) *Levi v. Anglo-Continental Co.* [1902] 2 K. B. 481.

(*e*) Ord. XVI. r. 48.

(*f*) *Ibid.* r. 49.

(*g*) *Ibid.* r. 52. (And see *Baxter v. France* [1895] 1 Q. B. 455.)

(*h*) *Schneider v. Batt* (1881) 8 Q. B. D. 701.

(*i*) Ord. XXIII. r. 1.

objection in point of law (*a*), or to put in a defence to a counter-claim. If there is no reply, all the material facts alleged in the defence are deemed to be denied (*b*). The rules applicable to a defence apply to a defence to a counter-claim.

The pleadings are generally closed at this stage; but it is possible, though rare, to have a 'REJOINDER,' a 'SUR-REJOINDER,' a 'REBUTTER,' and a 'SURREBUTTER.'

*Amendment of pleading.*—A statement of claim, whether specially indorsed on the writ or delivered separately, or a counter-claim or set-off, may be amended once without leave, before or after the delivery of the defence; but no further amendment can be made without the leave of the Master in chambers or the Judge at the trial (*c*). The defendant, however, can never amend his defence without leave, except where the statement of claim has been amended (*b*). Leave is usually given to make any amendment which may be necessary for the purpose of determining the real questions in dispute between the parties, if it will not cause injustice to the other side; and is generally given on the terms that the party making the amendment shall pay the costs thereby occasioned (*e*).

*Mode of trial.*—In the King's Bench Division, an action is tried by a judge alone, or by a judge with a jury, or by a referee or arbitrator. In actions of slander, libel, false imprisonment, malicious prosecution, seduction, or breach of promise of marriage (*f*), either party is entitled to obtain a jury by merely giving notice of his desire in his notice of trial, if he is the plaintiff, or within four days of notice of trial, if he is the defendant. In most other cases, a party desiring trial with a jury must apply to the Master for leave, which in most cases will be granted if the questions of fact at issue are such as can conveniently

(*a*) Ord. XIX. r. 15.

(*b*) Ord. XXVII. r. 13.

(*c*) Ord. XXVIII. rr. 1, 2,  
and 6.

(*d*) *Ibid.* r. 5.

(*e*) See *Weldon v. Neal* (1887)  
19 Q. B. D., at p. 394.

(*f*) Ord. XXXVI. r. 2.

be tried with a jury. Where a jury is required, or ordered on a summons for directions, the jury will be a common jury ; unless either party desires a special jury (*a*). If the questions at issue involve any prolonged examination of documents, or any scientific or local investigation, which cannot conveniently be made before a jury or conducted by the court, or if they consist of matters of account between the parties, the Master or the Judge may, under the Arbitration Act, 1889 (*b*), order the whole action, or any questions of fact, to be tried before a referee or by an arbitrator agreed on by the parties (*c*). In any other case, an order referring the action for trial by a referee or arbitrator can only be made by consent (*d*). If no other mode of trial is required or ordered, in accordance with the rules above referred to, the action will be tried by a judge without a jury.

*Place of trial.*—On the summons for directions, the Master decides also where the action shall be tried ; whether at the Royal Courts of Justice in the Strand, or at assizes, or in a county court. In any action of contract, where the claim does not exceed 100*l.*, either party may apply to the Master to remit it to a county court for trial ; and the Master must make the order, unless there is good ground why the action should be tried in the High Court (*e*). Any action of tort may be remitted by the Master on the application of the defendant, whatever be the amount claimed, if the defendant can show on affidavit that the plaintiff has no visible means of paying the costs should he fail in the action (*f*). The action will then be remitted to a county court, unless the plaintiff gives security for costs, or shows that he has a cause of action fit to be prosecuted in the High Court.

(*a*) Ord. XXXVI. rr. 4, 5, B., at p. 79.  
and 6.

(*b*) S. 14.

(*c*) See *Ormerod v. Todmorden*  
(1882) 8 Q. B. D., at p. 664 ;  
*Hurlbatt v. Barnett* [1893] 1 Q.

(*d*) *Ward v. Pilley* (1880) 5 Q.  
B. D. 427.

(*e*) County Courts Act, 1888,  
s. 65.

(*f*) *Ibid.* s. 66.

*Discovery.*—If any document is referred to in any of the pleadings, it must, as a rule, on notice being given, be produced for the inspection of the party giving the notice (a). But, in addition to this limited right of DISCOVERY, each party is usually entitled to general inspection of all documents in the possession or power of his opponent, which relate to any of the matters in question in the action (b).

Application for general discovery of documents is usually made on the summons for directions, and, in a suitable case, an order is made by the Master directing each party to make discovery on oath after delivery of the defence. Discovery is made by an affidavit of documents (c), in which the party sets out in two schedules to the affidavit three lists of documents. The first schedule is divided into two parts; the first part containing a description of all the material documents in his possession which the party is willing to produce, and the second part containing those documents which he objects to produce. In the second schedule are set out those documents which the party once had, but no longer has, in his possession. The grounds of objection to produce the documents described in the second list must be stated in the body of the affidavit.

The following classes of documents are usually privileged from inspection:—(i) written communications passing between the party and his solicitor or other legal professional adviser in his professional capacity, for the purpose of legal advice or assistance; (ii) documents which have been prepared solely for the purpose of litigation, such as proofs of witnesses, instructions to counsel, briefs or papers prepared by any servant or agent of the party for the use or assistance of the solicitor in advising in or conducting the action; (iii) documents of title to any property, if they contain nothing which can assist in establishing the alleged title of the opponent; (iv) documents

(a) Ord. XXXI. r. 15.

(b) *Ibid.* r. 12.(c) *Ibid.* r. 13.

not in the sole legal possession of the party ; (v) documents which would tend to incriminate the party producing them ; (vi) documents the production of which is contrary to public policy or detrimental to the public service.

The affidavit of documents, if drawn up in proper form, is *prima facie* evidence that the party making it has no other relevant documents in his possession ; but the other party, if dissatisfied with it, has two courses open to him. He may apply to the Master for an order for a 'further and better affidavit' ; on the ground that the opponent has omitted certain documents which are referred to in the documents disclosed, or in the pleadings, as being or having been in his possession. Or he may make an affidavit stating that in his belief the other party has, or has had, in his possession certain relevant documents, which must be specifically described in the affidavit (a) ; and then apply to the Master for an order requiring the other party to state by affidavit whether any of the specified documents are in his possession, or, if they have at any time been in his possession, when he parted with them, or what has become of them (b).

After making an affidavit of documents, the deponent must give the other party inspection of those the possession and relevancy of which he has admitted, and for which he has not claimed privilege ; and must give or allow copies to be made of any of the documents so inspected.

*Notice to produce documents.*—As a general rule, the contents of a private document can only be proved at the trial by production of the original. A party, therefore, who intends to rely on a document in the possession of his opponent, must serve him before the trial with a notice to produce it. If at the trial the party refuses to

(a) *White v. Spafford* [1901] 2 K. B. 241.

(b) O. XXXI. r. 19A.

produce a document which he has had notice to produce, the party relying on the document is allowed to prove its contents by what is called secondary evidence—that is, by means of a copy, or even by oral testimony.

*Notice to admit.*—If the original of the document is in the possession of the party relying on it, not only should it be referred to in his affidavit of documents, but notice to inspect and admit it ought to be given to his opponent before the trial; or the costs of proving the execution of the document may be disallowed (a). If the document relied on is in the possession of a stranger to the action, who is within the jurisdiction, he should be served with a *subpœna duces tecum* (b), summoning him to attend at the trial and produce the document.

*Interrogatories.*—Closely akin to discovery of documents is the practice of administering INTERROGATORIES. Interrogatories are written questions which the opposite party is required to answer on oath, to the best of his knowledge, information, and belief. Leave to administer them must be obtained from the Master (c), upon the summons for directions or on notice under the summons; and a copy of the proposed interrogatories must be supplied to the other side, and another submitted to the Master (d), so that, on the application for leave, any objections to them may be dealt with.

The object of interrogatories is to obtain information on material facts which are within the knowledge of the opposite party and not of the party interrogating, or to obtain admissions which will save the expense of calling witnesses, or to ascertain with greater precision the case which the other side intends to set up at the trial. The Master, in deciding whether to allow the particular interrogatories proposed, will consider whether their object can, more conveniently or at less expense, be attained by other means; and will take into account

(a) Ord. XXXII. r. 2.

(b) Ord. XXXVII. r. 20.

(c) Ord. XXXI. r. 1.

(d) *Ibid.* r. 2.



any offer made by the opposite side to deliver particulars, or make admissions, or produce documents relating to the subject-matter of the interrogatories.

On the application for leave to administer interrogatories, or in the answers (*a*) to those allowed, the party interrogated may take objection to them, on a variety of grounds, in addition to objections similar to those already mentioned in connection with the production of documents for inspection, where they apply (*b*). The objections most frequently made are, that the particular question objected to is directed to facts which are not relevant to the matters in issue, or is oppressive (*c*) or vexatious, or is 'fishing,' *i.e.*, is put with reference to facts which may possibly have occurred but are not definitely alleged, on the chance of discovering something which may assist the party interrogating to make out some case against his opponent (*d*). It is also an objection that the question seeks to discover not merely facts, but the evidence by which they are intended to be proved (*e*).

If interrogatories are allowed, and are insufficiently or evasively answered, the party interrogating may, on application to the Master, obtain an order for 'further 'and better answers' (*f*). At the trial, the party by whom the interrogatories have been administered, may put in all or any of the answers as evidence, or rely on them for purposes of cross-examination; but, if he relies on part of an answer, he must put in the whole of it.

*Security for costs.*—The defendant may apply for an order to compel the plaintiff, if ordinarily resident out of the jurisdiction, to give security for the costs of the action (*g*); or, if he is an insolvent person suing, as

(*a*) *Peck v. Ray* [1894] 3 Ch. 282.

(*b*) See *ante*, pp. 558–559.

(*c*) *White v. Credit Reform* [1905] 1 K. B., at p. 659.

(*d*) *Hennessy v. Wright* (1890) 24 Q. B. D. 445.

s.c.—III.

(*e*) *Eade v. Jacobs* (1877) 3 Ex. D. 335; *Benbow v. Low* (1880) 16 Ch. D., at p. 95; *Re Strachan* [1895] 1 Ch., pp. 445, 447, and 448.

(*f*) Ord. XXXI. r. 11.

(*g*) Ord. LXV. rr. 6 and 6A;

nominal plaintiff, for the benefit of a third party (a). But the mere fact that the plaintiff is insolvent or without visible means, or is a married woman without separate estate, is not sufficient ground for granting the application (b).

*Costs.*—The Master has full power to deal as he thinks fit with the costs of any application made to him. If the application is a proper one, the costs of it are usually made ‘costs in the cause’; which means that they will have to be paid by the party who is condemned at the trial in the costs of the action. If the application is not a proper one to make, and is made, for example, by the plaintiff, the Master may dismiss it ‘with costs’; in which case the defendant will be entitled to immediate taxation and payment of the costs occasioned by the application. Or he may order the costs to be ‘the defendant’s costs in any event’; in which case the plaintiff will ultimately have to pay them after final taxation; even though he succeeds in the action. Or the Master may order the costs to be ‘the defendant’s costs in the ‘cause’; which means that, if the plaintiff succeeds in the action, he will have to bear his own costs of the application, but if he fails, he will have to pay the defendant’s costs of it, in addition to bearing his own. The Master may, however, reserve to the Judge at the trial the question of the costs of any interlocutory proceedings.

*Appeal.*—An appeal lies as of right, from any order of a Master, to the Judge in chambers; even where the Master’s order only affects costs (c). With leave from the Judge or from the Court of Appeal, an appeal lies from the Judge in chambers to the Court of Appeal, in

*Crozat v. Brogden* [1894] 2 Q. B. 30. And see *Re Apollinaris Co.’s Trade Marks* [1891] 1 Ch. 1.

(a) *Cowell v. Taylor* (1885) 31 Ch. D., at p. 38; *Lloyd v. Hathern Brick Co.* (1901) 85 L. T. 158.

(b) *Rhodes v. Dawson* (1886) 16 Q. B. D. 548; *Re Thompson* (1888) 38 Ch. D. 317; *Cook v. Whellock* (1890) 24 Q. B. D. 658.

(c) *Foster v. Edwards* (1879) 48 L. J. Q. B. 767.

all matters of practice and procedure (*a*). In a few cases, an appeal lies from the Judge in chambers without leave (*b*); as, for example, from an order refusing unconditional leave to defend, or refusing or granting an injunction, or appointing a receiver. And, in some other cases, there is no appeal, even with leave; as, for example, from an order of the judge giving unconditional leave to defend (*c*), or from any order made by consent, or from any order made as to costs only (*d*).

An appeal from an interlocutory order is by motion, of which four days' notice must be given; and the appeal must, except by special leave of the Court of Appeal, be brought within fourteen days from the date of the order appealed from (*e*). The appeal may be, and usually is, heard by two judges (*f*).

*Commercial cases.*—In 1895, the judges of the Queen's Bench Division, acting under powers conferred by the Judicature Act, 1873, enabling them to make arrangements for the disposal of business in their Division, issued a notice containing certain provisions, made in accordance with the existing rules of practice, for the despatch of commercial business (*g*). The effect of the notice was to create in the division a court which is generally called the 'Commercial Court,' in which a judge of the division, familiar with mercantile law and the methods of business men, sits for the disposal and trial of commercial causes.

Although the judge is bound by the rules of evidence and procedure applicable to every division of the High Court and to every court of any division, the rules are so applied as to secure, as far as is practicable, the speedy and economical trial of commercial actions.

(*a*) Jud. Act, 1894, s. 1 (4).

(*b*) *Ibid.* s. 1 (2).

(*c*) *Ibid.* s. 1 (3).

(*d*) Jud. Act, 1873, s. 49.

(*e*) Ord. LVIII. rr. 3 and 15.

(*f*) Jud. Act, 1875, s. 12.

(*g*) See the notice of February, 1895, in the Introduction to Vol. i. of the Reports of Commercial Cases; and *Baerlein v. Chartered Bank* [1895] 2 Ch. 488.

If it is desired that an action should be tried in the Commercial Court, the writ should be issued out of the King's Bench Division in the ordinary way, and an application be made by summons to the Judge of the Commercial Court to transfer the action to the Commercial List. The application may be made by the plaintiff or the defendant, at any time after the service of the writ (a); and if the action is a commercial cause, the judge has a discretionary power to grant or refuse the application (b).

If an order for transfer is made, the action is placed in the Commercial List; and the summons for directions, and all subsequent applications under it, are heard by the Judge in court, instead of by the Master in chambers, as in an ordinary action in the King's Bench Division. The main object of proceedings in the Commercial Court is, that the Judge should have the control of the action as soon as possible after its commencement, and of all its stages, down to and including the trial, and give such directions as will enable him to dispose, with as little delay and expense as possible, of the real controversy between the parties. The frequent applications made to a Master in an ordinary action, which often cause expense or delay not commensurate with the benefit derived by the litigant from their results, are discouraged in the Commercial Court. Thus, pleadings are often dispensed with where the facts are substantially undisputed; and the action is then ordered to be tried on mutual admissions, or on a joint statement of facts. Where pleadings are considered necessary, they are described as 'points of claim' or 'points of defence,' to emphasise the desire for brevity and conciseness of pleading; and applications for particulars are not encouraged. When the case involves a question of law which may dispose of the whole

(a) *Barrie v. Peruvian Corporation v. Chartered Bank* [1895] 2  
 (1896) 1 Com. Cas. 269. Ch. 488.

(b) *Ibid.* (See also *Baerlein*

action, it is frequently ordered to be tried as a preliminary point of law. Instead of the ordinary affidavit of documents, an order is usually made that the solicitors for the respective parties prepare lists of documents, exchange the lists, and give inspection of the documents set out in their respective lists. In actions, however, against underwriters on policies of marine insurance, the plaintiff is generally required to make an affidavit of ship's papers, which is more stringent in form than an ordinary affidavit of documents. Interrogatories are rarely allowed in the Commercial Court.

To avoid the expense of strictly proving documents, or of examining witnesses abroad on commission, or of calling witnesses to prove facts which are not seriously disputed, the parties to an action are encouraged to admit as evidence documents or affidavits which would be inadmissible except by consent, and to make admissions of facts (*a*). Pressure may be indirectly brought to bear upon a party to make such admissions, by means of the discretionary power of the Judge to order him to pay the costs occasioned by his refusal to make admissions which the Judge at the trial, after hearing the evidence, considers that he ought to have made (*b*). A day is often fixed for the trial; in order that the parties and their witnesses may make their arrangements for attendance, and be saved the inconvenience of uncertainty as to the date when the case will be reached.

*Trial of an action.*—At the TRIAL OR HEARING of the action, the plaintiff has, as a rule, the right to begin; because on him usually lies the burden of proving at least one of the facts which are necessary to entitle him to the relief claimed and are not admitted in the defence, *e.g.*, the amount of unliquidated damages claimed. If the action is to be tried with a jury, the

(*a*) Jud. Act, 1894, s. 3; Ord. XXX. r. 7.

(*b*) Ord. XXI. r. 9; Ord. XXXII. rr. 2 and 4.

jury is called and sworn. The calling consists of drawing out the names of the jurors on the jury panel, and calling them over in the order in which they are drawn (a); and the twelve persons, whose names are first called and who appear, are sworn as the jury. But before they are sworn, they are liable to be challenged by either party on a variety of grounds; though in civil cases the right of 'challenge' is not often exercised, and when exercised it is limited to objecting to individual jurors on suspicion of bias or partiality. If a sufficient number of jurymen have not appeared when the panel is exhausted, either party may pray a *tales de circumstantibus*; and then any qualified persons who happen to be present may be made to act (b). When the jury is ready, the pleadings are opened, usually by the junior counsel for the plaintiff, with a brief statement of their effect; and then the case is opened, usually by the plaintiff's leading counsel, with a statement of the facts relied on and the evidence intended to be produced in their support, and an explanation of the issues to be decided.

After the opening statement is finished, the evidence for the plaintiff is produced; and, when this has been done, the case is opened on behalf of the defendant, and, if evidence is produced in support of the defence, his counsel is entitled to sum it up. The plaintiff's counsel, if he began, is then heard by way of reply; but no reply is allowed, except on behalf of the Crown, unless evidence has been given for the defence. If the defendant does not call any witnesses, counsel for the plaintiff sums up his evidence at the close of the plaintiff's case; and then counsel for the defendant replies.

When the action is tried with a jury, no mention must be made of the amount of damages claimed, or the fact that money has been paid into court (c); and no facts

(a) Juries Act, 1825, s. 26; 1870, s. 16.

Common Law Procedure Act, (b) Juries Act, 1825, s. 37.

1852, ss. 108, 110; Juries Act, (c) Ord. XXII. r. 22.

must be stated by either counsel which are either not admitted or are not intended to be proved.

After the speeches of counsel, the Judge, if the action is tried without a jury, delivers judgment; and if the action is tried with a jury, he sums up the case to them, and the jury then considers its *VERDICT*. If the jurors cannot all agree on the verdict, they are discharged, and a second trial before a fresh jury will be necessary; unless the parties consent to accept the verdict of the majority.

The judge may leave the jury to return a *general verdict* for the plaintiff or for the defendant; or he may direct a *special verdict*, by putting to the jury certain questions to answer. In the latter case, he afterwards decides what is the legal result of the answers. When the damages claimed are unliquidated, they are assessed by the jury. The judge then gives *JUDGMENT* according to the findings of the jury, and decides all questions with regard to costs. If the defendant is unsuccessful and desires to appeal, an application may be made for a stay of execution, *i.e.* for an order that the judgment given against the defendant shall not be enforced by seizure of his goods or other compulsory means (*a*). If this application is granted, it is usually granted on the terms of payment of money into court or to the plaintiff, and of notice of appeal being given within a fixed time, and, as regards costs, that they be taxed and paid to the successful party's solicitor on his undertaking to return them, if so ordered by the Court of Appeal.

*Evidence*.—The facts relied upon by either party in support of his claim or defence must, if not admitted by his opponent, nor presumed by the court in his favour, be proved by him by evidence. Some of the facts may be admitted in his opponent's pleading; others may have been admitted in pursuance of a notice to admit (*b*), in order to save the costs of proving them; or, if the only

(*a*) As to these means, see *post*, pp. 576–580.

(*b*) Ord. XXXII. r. 4. (See *ante*, p. 560.)

issue in the action is a question of law, the parties in some cases agree to a statement of facts, and so avoid the necessity of calling any evidence at all.

A litigant need not prove any fact which the law presumes in his favour ; unless his opponent adduces evidence to the contrary. Thus, for example, in an action for libel, the plaintiff need not prove that the words are untrue ; except to rebut evidence given by the defendant in support of a plea of justification. In an action on a bill of exchange, the holder is *prima facie* deemed to be a holder in due course, and need not prove that he gave value for it (*a*) ; and the child of a married woman is presumed to be legitimate, in the absence of clear proof to the contrary.

There are also certain facts of which the court will take judicial notice, and of which evidence therefore is not required ; such as the public statutes, all private Acts of Parliament passed since 1850, customs settled by judicial decision, public matters connected with the government of the country, matters of common and certain knowledge, such as the meaning of common words and phrases, and events which must happen in the ordinary course of nature.

Subject to these exceptions, all facts relied on must be proved by oral or documentary evidence. The only facts which can be relied on, and to which therefore the evidence must be confined, are the facts *in issue* on the pleadings, or other facts which are *relevant* to them ; that is to say, which tend to prove or disprove the facts in issue on which the claim or defence is based. Any other fact is irrelevant to the issue ; and evidence tendered to prove it is inadmissible. Thus, in an action for damage by negligence on a particular occasion, the fact that the defendant has been careless on other occasions would be irrelevant. Evidence in chief to prove the character of either party is inadmissible, as being irrelevant ; unless

(*a*) Bills of Exchange Act, 1882, s. 30 (2).



the character of the party is a fact directly in issue, as in an action by a servant for wrongful dismissal, or in an action for libel or slander, or is relevant to the question of damages, as in actions for breach of promise of marriage or seduction. In actions for libel or slander, in which the defendant has not pleaded justification, he cannot, without leave of the judge, give evidence in chief of the plaintiff's bad character in mitigation of damages ; unless he has, at least seven days before the trial, given the plaintiff particulars of the facts which he intends to prove (a).

*Oral evidence.*—Oral evidence is given by witnesses examined on oath or affirmation (b) before the court, or out of court before an examiner or on commission, if, owing to illness or absence abroad, the witness cannot attend the trial. In civil cases, every person is now competent to give evidence (c) ; unless, owing to infancy, unsoundness of mind, or drunkenness, he is, in the opinion of the Judge, unable to understand the nature of an oath, or the duty of speaking the truth, or to give rational testimony. The attendance at the trial of any witness, who is within the jurisdiction, can be secured by serving him with a writ of *subpœna ad testificandum*, and by paying or tendering him a sum to defray his reasonable expenses of attendance. If he fails to answer, when called on his *subpœna*, he is liable to be fined or imprisoned for contempt of court, and also to an action for damages at the suit of the party who subpœnaed him.

*Examination-in-chief.*—There are certain kinds of questions which, as a general rule, ought not to be put to a witness in examination-in-chief, *i.e.* the first examination by counsel for the party on whose behalf he is called and which, if put, can be properly objected to.

(1) No question can be put to elicit a fact which is not within the personal knowledge of the witness. Thus, it

(a) Ord. XXXVI. r. 37.

(c) Evidence Acts, 1843, 1851,

(b) Oaths Acts, 1888 and 1909. 1853, 1869, and 1877.

is generally inadmissible to ask a witness what another person, whether living or deceased, has told him orally or in writing. Such evidence is called *hearsay*, and is objectionable, because the person who is alleged to have made the statement, did not make it on oath, and cannot be cross-examined; and because there is always a danger of inaccuracy in the repetition of a statement (a). To the general rule that evidence is inadmissible of a statement made by a person not called as a witness, there are many exceptions, of which the following should be noticed. A statement made in writing by a deceased person is admissible, if the whole or part of it was against his pecuniary or proprietary interest—as, for example, an entry in his cash-book that he received money in payment of a debt due to him (b), or an entry made in the usual course of business of a transaction done by him; his duty being both to do the act recorded, and to record it at or about the time of doing it. Where the state of a person's health is a fact in issue in the action (as, for example, where it is alleged that a testator was unfit to make a will at the date of its execution), evidence is admissible of statements made by such person as to his health at such time. Declarations by a deceased person upon questions of pedigree, or as to public rights or customs, are generally admissible to prove their existence or non-existence (c). A statement made by the opposite party, or by an agent with his express or implied authority, may be given in evidence against him as an admission.

(2) No question is admissible which is put to elicit a fact which is not relevant to a fact in issue in the action.

(a) *Stobart v. Dryden* (1836) 1 M. & W. 615; *Wright v. Doe* (1837) 7 A. & E. 384.

(b) *Higham v. Ridgway* (1808) 10 East, 109; *Fursdon v. Clogg* (1842) 10 M. & W. 572; *Taylor*

*v. Witham* (1876) 3 Ch. D. 605.

(c) *Davies v. Lowndes* (1838) 5 Bing. N. C. 161; *Haines v. Guthrie* (1884) 13 Q. B. D. 818; *Glenister v. Harding* (1885) 29 Ch. D. 985.

(3) No question is admissible which is put to elicit the opinion of the witness on facts from which it is the function of a jury to draw their own inferences; but the opinion of experts is admissible on matters requiring special skill or experience.

(4) No question is admissible which is put with the object of adding to, varying, or contradicting, the terms of a written document. But oral evidence is admissible to prove any term implied by custom in a written contract, if not inconsistent with the express terms of the contract (a); or to prove the existence of any collateral agreement (b); or to prove that the contract is invalid by reason of fraud or otherwise, or has been rescinded or modified; or to explain a latent ambiguity in the terms of a contract; or to show that certain words used have acquired, in the particular trade or locality, a special meaning (c); or to explain all the surrounding circumstances, so as to enable the court to identify the parties to, or the subject-matter of, the contract, or to interpret its terms (d).

(5) No 'leading' question, that is to say, no question which is put in such a form as to suggest to the witness the answer he is desired to give, is, strictly, admissible in examination-in-chief. But leading questions may properly be asked with reference to facts which are merely introductory, or are not disputed, or to contradict directly a fact sworn to by another witness, or to identify a person or thing.

*Cross-examination.*—A witness examined by one party may always be cross-examined by the other party. In cross-examination, a much wider latitude is allowed with regard to the kind of questions which may be put to the

(a) *Tucker v. Linger* (1883) L. R. 8 App. Ca. 508.

(b) *Pym v. Campbell* (1856) 6 E. & B. 370; *Martin v. Spicer* (1886) 34 Ch. D. 1.

(c) *Smith v. Wilson* (1832) 3

B. & Ad. 728.

(d) *M'Donald v. Whitfield* (1883) L. R. 8 App. Ca. 733; *Filby v. Hounsell* [1896] 2 Ch. 737; *Plant v. Bourne* [1897] 2 Ch. 281.

witness. The objects of the cross-examiner are to weaken his opponent's case, by showing that the evidence of his witnesses is untrustworthy, or to establish his own case by obtaining admissions from the witnesses called by his opponent; and it is his duty to indicate in his cross-examination what facts deposed to by the witnesses in examination-in-chief he disputes, and to put to each of them in turn so much of his own case as the particular witness is in a position to admit or deny. In cross-examination, therefore, questions may be put to elicit facts which, though not relevant to any fact in issue, tend to discredit the witness, by showing grounds for doubting his accuracy or his honesty. Thus, in cross-examination, a witness may be asked any 'leading' question, or any question to show his bias or interest in the action, or that he has, on a previous occasion, made statements inconsistent with the evidence he has given, or that he has been convicted of any crime.

But where a question is put to elicit a fact which is merely relevant to the credit of the witness, and not to any fact in issue in the action, the answer of the witness is final, and no evidence can afterwards be called to contradict it; otherwise the case might branch out into all kinds of irrelevant inquiries. To this rule there is, however, the exception that, where a witness has, in cross-examination, denied bias, or that he has made a previous inconsistent statement, or that he has been convicted of a crime, evidence may afterwards be given to contradict his denial. Where the witness denies having made a previous inconsistent statement, then, if it was oral, the circumstances in which it was made must be mentioned to him, so as to give him an opportunity of remembering the occasion; and, if it was made in writing, his attention must be called to the document, before it can be put in evidence to contradict him (a).

A conviction of crime, denied by the witness, may

(a) Criminal Procedure Act, 1865, ss. 4, 5.

be proved by a certificate containing the substance of the indictment or conviction, or, in the case of a summary conviction, by production of a copy of the conviction (a).

There are certain questions which, though allowed to be put, the witness is not bound to answer ; such as any question which tends to show that he has committed a crime (of which he has not been convicted), or which seeks to obtain the disclosure of any communication between husband and wife (b), or between legal adviser and client (c).

*Re-examination.*—A witness, who has been cross-examined, may be re-examined by the party who called him ; but he cannot, except by the Judge or with leave, be asked any question which does not arise out of his cross-examination. The object of re-examination is to explain more fully any matter referred to in cross-examination, or to give the witness an opportunity of explaining any inconsistency or mistake in the answers given by him in cross-examination.

*Documentary evidence.*—Documentary evidence must, as a general rule, be proved by production of the original documents in court at the trial. To this rule there are several exceptions, which may be broadly summarised as follows.

The contents of a public document may usually be proved by a certified copy (d), signed by the official who has the custody of the original. The contents of a judicial document may usually be proved by an *office copy*, made by the officer of the court who has the custody of the original. Under the Bankers' Books Evidence Act, 1879, an entry in a banker's book may be proved by an examined copy, produced by a clerk from the bank who

(a) Common Law Procedure Act, 1854, s. 24 ; Prevention of Crimes Act, 1871, s. 18.  
(b) Evidence Act, 1853, s. 3.

(c) *Williams v. Quebrada* [1895] 2 Ch. 751.

(d) Evidence Act, 1851, s. 14.

has examined it with the original. The contents of a private document may be proved by a copy, or even by the oral testimony of a witness who can speak to its contents from memory. But secondary evidence of this kind can only be given if the original has been lost or destroyed, or if it is in the possession or control of the opposite party, and he refuses or is unable to produce it when called for at the trial (after having been duly served with a notice to produce it), or if the original is in the possession of a stranger to the action and is a privileged document which he is not legally bound to produce (such as a title-deed), and he refuses to produce it after being duly served with a *subpœna duces tecum*. A private document, if required by law to be attested, must, unless it is thirty or more years old and it comes from a 'proper' custody (a), or its due execution is admitted, be proved by calling an attesting witness, or, if no attesting witness can be found within the jurisdiction, by calling some person to prove the signature of one or more of the attesting witnesses. A private document, which is not required by law to be attested, must, unless admitted, be proved by proving the handwriting and signature of the person who executed the document; and, if the document is a deed, the sealing and delivery must be proved.

*Costs*.—Where the action is tried with a jury, the successful party is entitled to recover his costs of the action; unless the judge before whom the action is tried otherwise orders for good cause (b), or unless the action is one which could and ought to have been brought in a county court. Thus, the judge may make a special order directing a successful plaintiff to pay his own costs, where the jury, by awarding contemptuous damages, has indicated its view that the action should not have been brought; or, if the plaintiff has been guilty of gross

(a) *Meath v. Winchester* (1836) 3 Bing. N. C. 183.

(b) *Forster v. Farquhar* [1893] 1 Q. B. 564.

misconduct, may even order him to pay the defendant's costs (a). For good cause, even a successful defendant may be deprived of his costs (b); but he cannot be ordered to pay the whole of the costs of the action (c). There is no appeal from the refusal of the judge to make an order depriving the successful party of his costs (d); but if he does so deprive him, an appeal lies to the Court of Appeal on the question whether any 'good cause' did exist. If no such cause existed, the judge had no power to make the order, which will, accordingly, be reversed; but if there was 'good cause,' the Court of Appeal will not interfere with the way in which the judge has exercised his discretion (e). If the action is of the kind which could have been brought in a county court, then, unless the judge certifies that there was sufficient reason for bringing it in the High Court, the plaintiff, though successful, will be entitled to no costs, or to costs only on the county court scale, according to the nature of the action and the amount recovered. In an action of contract (f) such a plaintiff is not entitled to any costs if he recovers less than 20*l.* (g); and is entitled to county court costs only, if he recovers 20*l.* or over, but less than 100*l.* (h). In an action of tort (i), a successful plaintiff is not entitled to any costs if he recovers less than 10*l.*; and is entitled to county court costs only, if he recovers 10*l.* or over, but less than 20*l.*

If the action is tried by a judge without a jury, he has full power to deal with the costs as he in his discretion considers fair and just between the parties (k). No

(a) *Myers v. The Financial News* (1888) 5 T. L. R. 42.

(b) *Bostock v. Ramsey District Council* [1900] 2 Q. B. 616.

(c) *Andrew v. Grove* [1902] 1 K. B. 625.

(d) *Moore v. Gill* (1888) 4 T. L. R. 738.

(e) *Huxley v. West London Ry. Co.* (1889) L. R. 14 App. Ca. 26.

(f) Ord. LXV. r. 12.

(g) County Courts Act, 1888, s. 116.

(h) County Courts Act, 1903, ss. 2, 3.

(i) County Courts Act, 1888, s. 116.

(k) Ord. LXV. r. 1; Judicature Act, 1890, s. 5.

appeal lies from his order, if made in the exercise of his discretion; but the discretion must be exercised judicially (a). As a general rule, the costs of the action follow the event, in the absence of any special reasons for ordering otherwise; and where there are distinct issues raised in the action, the party in whose favour final judgment is entered usually gets the general costs of the action, but is ordered to pay the costs of the issues on which he has not succeeded (b).

The order almost always directs that the costs shall be taxed. The solicitor for the party who has obtained an order for costs, delivers his bill of costs, which is then taxed by a Master, who, after hearing the objections of the other party, disallows or reduces such items as he considers unreasonable or excessive. As a rule, the amount allowed on taxation is all that can be recovered by the successful party; and he has to pay his own solicitor the extra costs disallowed on taxation, in so far as they are reasonable and proper charges as between himself and the solicitor. The judge cannot award costs to be taxed as between solicitor and client; unless there is an express statutory provision enabling him to do so (c).

If the cost of any interlocutory proceeding, such as the costs of a commission to take evidence abroad, have been left by the Master to be dealt with by the Judge at the trial, an application for such costs must be made immediately after judgment is delivered; otherwise they will not be allowed on taxation, but will have to be borne by the party who incurred them (d).

*Execution.*—Execution is the process by which a judgment is enforced. There are many modes of execution;

(a) *Cooper v. Whittingham* (1880) 15 Ch. D. 501; *Civil Service Society v. General Steam Navigation Co.* [1903] 2 K. B. 756.

(b) *Lund v. Campbell* (1885) 14

Q. B. D. 821.

(c) *Andrews v. Barnes* (1887) 39 Ch. D. 133.

(d) *Executors of Sir Rowland Hill v. Metropolitan Asylum* (1880) 49 L. J. Q. B. 668.



but the following are those usually adopted to enforce a judgment for the payment of money.

(1) Writ of *fiery facias*.—This is the most common form of execution; and it is directed against the goods and chattels of the judgment debtor. The writ is addressed to the sheriff, and authorises him to seize and sell sufficient of the goods and chattels belonging to the judgment debtor, to satisfy the amount of the judgment, together with interest at the rate of four per cent. Under this writ, the sheriff may sell a lease belonging to the debtor, or his growing crops, but not any freehold interest, nor fixtures, nor any equitable interest in land or goods. Under the Judgments Act, 1838 (*a*), the sheriff may take any money, bank-notes, bills of exchange, or other securities for money, belonging to the judgment debtor, and may sue upon them in his own name, and pay over to the judgment creditor the money which he recovers. The wearing apparel and bedding of the judgment debtor or his family, and the tools and implements of the debtor's trade, are exempted from seizure; if their total value does not exceed five pounds (*b*).

When goods seized by the sheriff are claimed by a third party, the sheriff usually seeks the protection of the court by taking out an INTERPLEADER SUMMONS (*c*), which is served on both the claimant and the execution creditor, and calls on them to appear in chambers and state the nature and particulars of their claims, and either to maintain or abandon them (*d*). On the hearing of this summons, the Judge or Master may dispose of the merits of the rival claims to the goods, and decide them in a summary manner (*e*), or direct an issue (*f*) to be tried between the claimant and the execution creditor,

(*a*) 1 & 2 Vict. c. 110, s. 12.

(*b*) Small Debts Act, 1845 (8 & 9 Vict. c. 127), s. 8; County Courts Act, 1888, s. 147.

(*c*) Ord. LVII. r. 1 (*b*).

(*d*) *Ibid.* r. 5.

(*e*) *Ibid.* r. 8; *Harbottle v. Roberts* [1905] 1 K. B. 572.

(*f*) Ord. XXXIII. r. 1. (Such issue is tried like an ordinary action (Ord. XXXVI. r. 44).)

for the purpose of determining which of them is entitled to the goods.

(2) Writ of *elegit*.—Under this writ, the sheriff can put the judgment creditor in possession of any land legally belonging to the judgment debtor, or held solely in trust for him, until the judgment is satisfied ; and the creditor may, after the land has been actually delivered in execution, apply, by originating summons in chambers in the Chancery Division, for an order for the sale of the debtor's interest in the land (a). Formerly goods also could be seized under a writ of *elegit* ; but, since the Bankruptcy Act, 1883 (b), the writ no longer extends to goods.

(3) *Garnishee order*.—Debts due to the judgment debtor cannot be seized under a writ of *fiery facias* ; but they may be attached by means of garnishee proceedings (c). The judgment creditor may obtain, on *ex parte* application to the Master in chambers, an order that any debt owing from any person within the jurisdiction who is indebted to the judgment debtor, and who is called the *garnishee*, be attached to answer the judgment, together with the costs of the garnishee proceedings, and that the garnishee appear in chambers and show cause why he should not pay to the judgment creditor the debt due from him to the judgment debtor. The order must be served on the garnishee, and also on the judgment debtor. As soon as it is served, it binds the debt in the hands of the garnishee ; and he must not pay his debt to the judgment debtor (d).

The garnishee must then appear, if he disputes his liability ; or he may pay the debt to the judgment creditor or into court, or execution may be issued against

(a) Judgments Act, 1838, ss. 11, 13 ; 1864, ss. 4-6 ; Land Charges Act, 1900, Ord. LV. r. 9B.

(b) S. 169.

(c) Ord. XLV.

(d) *Sampson v. Seaton Railway Co.* (1874) L. R. 10 Q. B. 28 ; *Tapp v. Jones* (1875) *ibid.* 591 ; *Chatterton v. Watney* (1881) 17 Ch. D. 259 ; *Norton v. Yates* [1906] 1 K. B. 112.

him to enforce payment. If the garnishee appears, and disputes his liability, the Master may direct an issue to be tried between him and the judgment creditor for the purpose of deciding his liability. Payment by a garnishee under any order of the court is a valid discharge of his debt to the judgment debtor.

(4) *Charging order*.—On the application of the judgment creditor to the Master or Judge in chambers, an order may be made charging stock or shares belonging to the judgment debtor with payment of the amount of the judgment debt (a). The order must be served on the company, bank, or corporate body, whose stock or shares are charged; and its effect is to prevent the judgment debtor from transferring such stock or shares until the order is discharged. The creditor, after obtaining the order, may obtain a *stop order* on the dividends or interest payable to the debtor; and he may bring a separate action in the Chancery Division to obtain an order for the sale of the stock or shares comprised in the charging order (b).

(5) *Receiver*.—In cases where the debtor has an equitable interest in land or other property, which cannot be taken in execution by any of the modes above mentioned, but which is properly available for payment of his debts, an order may be obtained appointing a receiver to receive the debtor's interest in the property and so make it available for satisfaction of the judgment. This is commonly called 'equitable execution.'

*Possession of land or chattel*.—A judgment for the recovery of land is enforced by a *writ of possession* (c), by which the sheriff is ordered to enter on the land, and cause the person named in the writ to have possession of it without delay. A judgment for the recovery of a chattel

(a) Ord. XLVI.

(b) *Kolchmann v. Meurice*  
[1903] 1 K. B. 534. (For further  
details as to the procedure for

obtaining *charging* or *stop orders*  
see *post*, pp. 620–622.)

(c) Ord. XLVII.

may be enforced by a *writ of delivery* (a), by which the sheriff is ordered to distrain defendant by all his lands and chattels, till he delivers the chattels; and, if the defendant still refuses to do so, a *writ of assistance* may be obtained to enable the sheriff to seize the chattel.

*Attachment*.—A judgment directing the defendant to do some specific act other than to pay money, or to abstain from doing some act, may also be enforced by a writ of attachment or order of committal (b). If the defendant disobeys the judgment, he is guilty of a contempt of court, and, on the plaintiff's application, a writ of attachment may be issued, commanding the sheriff to arrest him, and bring him before the court to answer for his contempt (c). He may be fined, or imprisoned until he purges his contempt by obeying the order of the court.

*Sequestration*.—A judgment or order to pay money into court, or to do any other act in a limited time, may be enforced by a writ of sequestration against the rents and profits of any real estate, and all the personal estate, of the person who disobeys the order (d). The writ is directed to persons called sequestrators, and authorises them to enter on the lands of the disobedient person and receive the rents and profits, and detain all his goods until he obeys the order; and, by leave of the court, the sequestrators may sell the goods, and pay the proceeds into court, to be dealt with as the court may direct.

*Appeal*.—An appeal, or application for a new trial, or to set aside a verdict, finding, or judgment, lies to the Court of Appeal from every final judgment of the King's Bench Division on any question of law or fact, whether

(a) Ord. XLVIII.; *Hymas v. Ogden* [1905] 1 K. B. 246.

(b) Ord. XLII. r. 7. (Strictly speaking, attachment lies for omission, committal for positive disobedience; but there is now no substantial difference between

them. For a fuller description of the process of attachment, see *post*, pp. 617–620.)

(c) *In re Evans* [1893] 1 Ch. 252.

(d) Ord. XLIII. r. 6.

the trial was with or without a jury (*a*). The appeal or application in all cases is by notice of motion, which must state whether the whole or part only, and, if part only, what part of the verdict, finding, or judgment, is complained of (*b*). Where the trial was with a jury, the notice must also state the grounds of the application; but where the trial was without a jury it is not necessary to ask specifically for a new trial, or to state the grounds of the application (*b*). The notice of motion in all cases is a fourteen days' notice, and must be served within six weeks from the trial, or, where the trial has been adjourned for further consideration, within six weeks after judgment has been given in an action on such further consideration (*c*). An appeal from an interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, must be brought within fourteen days (*d*).

The grounds for the application for a new trial are generally one or more of the following:—(1) that the judge misdirected the jury; (2) that the verdict was against the weight of the evidence, or that there was no evidence to go to the jury; that is to say, that the verdict was such that no reasonable men could on the evidence have found (*e*), or that the evidence was insufficient to make out a *prima facie* case or defence, and should not have been left by the judge to the jury; (3) that the damages are excessive or inadequate; that is to say, so large that no reasonable men could have given them (*f*), or so small that the jury must have left entirely out of

(*a*) Ord. XXXIX. rr. 1, 2; Ord. LVIII. r. 1.

(*b*) Ord. XXXIX. r. 3; Ord. LVIII. r. 1.

(*c*) Ord. XXXIX. r. 4; Ord. LVIII. r. 15.

(*d*) Ord. LVIII. r. 15, which see, as to mode of calculating the time.

(*e*) *Webster v. Friedeberg* (1886) 17 Q. B. D. 736; *Metropolitan Ry. Co. v. Wright* (1886) L. R. 11 App. Ca., at pp. 154 and 156; *Australian Newspaper Co. v. Bennett* [1894] A. C. 284.

(*f*) *Praed v. Graham* (1890) 24 Q. B. D. 53.

consideration some substantial element of damage (*a*), or made some mistake in calculating the figures ; (4) that the judge wrongly admitted or rejected material evidence ; or (5) that fresh and conclusive evidence has been discovered since the trial (*b*), which could not reasonably have been discovered before it. But there can be no direct appeal from the verdict of a jury.

The appeal or application for a new trial must be heard by not less than three judges, except by consent of the parties (*c*). The Court of Appeal has all the powers and jurisdiction of the High Court (*d*), and can give any judgment or make any order which ought to have been given or made in the court below (*e*). It has full discretion over the costs of the appeal (*f*) ; but, as a rule, the costs follow the event. If a new trial is ordered, the costs of the first trial generally abide the order made on the second as to costs (*g*). If the judgment of the court below is reversed, the appellant usually gets the costs of the action and of the appeal.

An appeal lies from the Court of Appeal to the House of Lords, and is brought by way of petition. The practice is regulated by the Appellate Jurisdiction Acts, 1876 and 1887, and by Standing Orders made thereunder (*h*). The appellant and the respondent each lodges a printed 'case,' setting out shortly the nature and main facts of the dispute, and the proceedings in the courts below ; summarising the judgments ; and stating reasons why the judgment of the Court of Appeal should be reversed or affirmed. The cases are bound in a volume, together with an appendix, which contains the pleadings, the evidence given *vivâ voce*, the documents put in at the

(*a*) *Phillips v. L. & S. W. Ry. Co.* (1879) 5 Q. B. D. 78.

(*b*) *Young v. Kershaw* (1900) 81 L. T. 531.

(*c*) Judicature Act, 1875, s. 12, and 1899, s. 1.

(*d*) Judicature Act, 1873, s. 19.

(*e*) Ord. LVIII. r. 4.

(*f*) *Ibid.*

(*g*) *Brotherton v. Metropolitan District Ry. Committee* [1894] 1 Q. B. 666.

(*h*) See *ante*, pp. 529–530.

trial, the judgments delivered, and the orders or decrees made in the courts below. The appeal is heard by not less than three Lords of Appeal; and may be heard whether Parliament is sitting or not (*a*). The appeal must be brought within one year from the delivery of the judgment appealed from. On the hearing of the appeal, each of the parties is entitled to speeches by two counsel; and the appellant's counsel is also entitled to be heard in reply. The House of Lords may dismiss or allow the appeal, or vary the judgment appealed from; and it has full power to deal with the costs of the appeal, and of the proceedings in the courts below.

Having now stated all the proceedings in a 'common law' action, from the commencement to the conclusion thereof by judgment and execution thereon, or by appeal, we may summarise the various steps or stages in the action, with the times appointed for each :—

THE STEP.	THE TIME.
Defendant's appearance to writ of summons ;	within 8 days after service of writ.
Statement of claim—delivery of, if ordered ;	within time specified in the order, or, if no time specified, within 21 days from date of order.
Defence—delivery of ;	within time specified in the order, or, if no time so specified, within 10 days after delivery of statement of claim ;

(*a*) Appellate Jurisdiction Act, 1876, ss. 5, 9.

THE STEP.	THE TIME.
<p>Defence—<i>continued</i>.  but if to specially indorsed writ,—</p>	<p>within 10 days from time limited for appearance to writ ; unless the plaintiff within that time serves a summons for judgment or for directions, in which case within time limited in the order, or, if no time limited, 8 days from date of order.</p>
<p>Reply—delivery of, if ordered ;</p>	<p>within time limited by the order, or, if no time so limited, within 10 days after delivery of defence.</p>
<p>Trial, notice of—delivery of ;</p>	<p>with reply (if any), or where no order for a reply has been made under Order XXIII., rule 1, on expiration of 4 days after defence or last of defences has or have been delivered, or at any time after the issues are ready for trial ;</p>
<p>but if given by defendant ;</p>	<p>after 6 weeks from the time plaintiff first becomes entitled to give notice of trial ;</p>



THE STEP.	THE TIME.
Trial— <i>continued</i> . or, if trial under Order XVIII.A. ( <i>i.e.</i> , without pleadings) ;	within 10 days after appearance.
Trial, notice of, length of ;	10 days ; or (if short) 4 days ; or (if trial under Order XVIII.A.) 21 days.
New trial, notice of motion for—delivery of ;	within 6 weeks after trial.
New trial, notice of motion for—length of ;	14 days.
Appeal to Court of Appeal, notice of motion for—delivery of :	
(1) from final order or judgment ;	within 6 weeks ( <i>a</i> ) ;
(2) from any other order ;	within 14 days ( <i>a</i> ) ;
(3) from <i>ex parte</i> refusal ;	within 4 days.
Appeal to Court of Appeal, notice of motion for—length of :	
(1) in case of final order or judgment.	14 days ( <i>b</i> ).
(2) in case of any other order ;	4 days ( <i>c</i> ).
Appeal to Divisional Court, notice of motion—delivery of :	
(1) if from inferior court ;	within 21 days ;
(2) if from chambers ( <i>d</i> ) ;	within 8 days (in general).

(*a*) The six weeks and the fourteen days reckon respectively from the date of the judgment or order being perfected, or (in case of refusal of order)

from date of refusal. (*Re Helsby* [1894] 1 Q. B. 742.)

(*b*) Cross-appeal—eight days.

(*c*) Cross-appeal—two days.

(*d*) Appeals from orders in

THE STEP.	THE TIME.
Appeal to Divisional Court, notice of motion—length of :	
(1) if from inferior court ;	8 days ;
(2) if from chambers ;	8 days.
Appeal to House of Lords— petition ;	within 1 year.
Execution on judgment—issue of ;	within 6 years.
Execution on judgment—re- newal of ;	within 1 year after issue.

chambers (when they lie) in Appeal (Judicature Act, 1894,  
 matters of practice and pro- s 1 (4)).  
 cedure, are to the Court of

## CHAPTER XIV.

## OF PROCEEDINGS IN THE CHANCERY DIVISION.

WE shall now proceed to consider an action in the Chancery Division; first, where such action is commenced by writ of summons, and secondly, where it is commenced by other means.

And first, where the action is commenced by WRIT OF SUMMONS. In this case there are, with some exceptions and additions, the same stages in the action as we have just gone through in treating of an action in the King's Bench Division; but there are some variations of considerable importance, which we must now consider.

I. *Writ and interlocutory proceedings.*—The plaintiff must secure the cause to be assigned to one of the judges of the Chancery Division (*a*). The indorsements of claim required on every writ of summons vary with the nature of the equitable relief that may be sought, and include claims as a creditor, or as a legatee, to have the estate of one who is deceased administered; to have the accounts of certain partnership or mortgage transactions taken; that certain trusts may be carried into execution; that a certain deed may be set aside or rectified; for the specific performance of agreements; and a great many others (*b*). But it must not be

(*a*) Ord. V. rr. 5, 9; Ord. XLIX. The assignment is now by ballot in the Writ Department before issue of writ; and the plaintiff has no choice of judge. (Ord. V. r. 9; and notes

thereon in *Yearly Practice*.)

(*b*) See examples given in R. S. C., App. A. part iii. sect. 1; also notes in the *Yearly Practice*, on s. 34 of the Judicature Act, 1873.

supposed that these examples by any means exhaust the business of the Chancery Division; and indeed there is high authority for the proposition, that almost any variety of action which might have been brought in the common law courts can now be brought in the Chancery Division (*a*). In particular, actions in which an injunction of some kind is claimed form a large part of the business of this division. It is specifically provided, that in all cases of ordinary account, as, for instance, in the case of a partnership, executorship, or ordinary trust account, where the plaintiff, in the first instance, desires to have an account taken, the writ of summons must be expressly indorsed with a claim that such account be taken (*b*).

In an action of the nature usually assigned to the Chancery Division, there is no judgment for default of appearance to the writ (*c*); but if the defendant does not appear, the plaintiff files the usual affidavit of service, and his statement of claim. There being no appearance, the provisions of Order XXX. do not apply in such a case; and consequently no summons for directions is required. But the plaintiff may, upon the default of the defendant in delivering defence, set down the action or motion for judgment (*d*).

As regards parties, one of several persons interested with others in an estate (as, for example, one of several residuary legatees, next-of-kin, devisees, persons interested in proceeds of sale of real estate or other *cestuis que trustent*) may obtain an administration judgment or order, without serving the rest (*e*); and, conversely, any executor, administrator, or trustee, may have a judgment or order against any one legatee, next-of-kin, or *cestui*

(*a*) See the judgment of JAMES, L.J., in *Warner v. Murdoch* (1877) 4 Ch. D. 750.

(*b*) Ord. III. r. 8; Ord. XXXIII. rr. 2-9.

(*c*) Ord. XIII. r. 12; Ord. XXI. r. 8.

(*d*) Ord. XXVII. r. 11.

(*e*) Ord. XVI. rr. 33-36.

*que trust* (a). And, in all cases of suits for the protection of property, one person may, in general, sue on behalf of himself and of all others having the same interest (b); although the court may require such other persons to be made parties, as it may deem proper (c). Also, an unknown heir-at-law, customary heir, or unascertained next-of-kin, or an unborn co-tenant, may, in any action where there is sufficient reason for not requiring such heir-at-law or other party to be first ascertained, be represented by some person or persons specially appointed by the court, and be bound by the judgment subsequently delivered; and this, whether the action does or does not merely involve a question of construction (d). Trustees, executors, and administrators represent their respective beneficiaries, whether suing or being sued, in actions for foreclosure, or for any other relief; although the court may at any time direct the beneficiaries to be joined as parties (e). An heir-at-law need not be made a party to any action to execute the trusts of a will, unless the will is to be established against him (f); and one or more persons out of a numerous class having the same or the like interest in any cause or matter may sue or be sued, or may be authorised to defend, on behalf of the entire class (g).

Before the stage is reached at which the delivery of pleadings begins, certain interlocutory proceedings of considerable importance frequently occur. Writs specially indorsed within the meaning of Order III., rule 6, are practically unknown in the Chancery Division (h); for the reason that actions to which such indorsements are

(a) Ord. XVI. r. 38.

(b) *Ibid.* r. 37.

(c) *Ibid.* r. 39.

(d) *Ibid.* r. 32. A representation order under this rule must not be confounded with a classification order under Ord. LV. r. 40. See *post*, pp. 598–599.

(e) Ord. XVI. r. 8.

(f) *Ibid.* r. 45.

(g) *Ibid.* r. 9.

(h) The writ was held specially indorsed, and judgment under Ord. XIV., ordered by NORTH J., in *Hamilton v. Brogden* (1891) 60 L. J. Ch. 88.

applicable are almost invariably commenced in the King's Bench Division. Consequently, applications under Order XIV., which are so common in the latter division, are of the rarest occurrence in the former. On the other hand, interlocutory motions for temporary relief, pending the trial of the action, are of everyday occurrence in the Chancery Division; their object being, most commonly, to obtain either an injunction or the appointment of a receiver. Relief of this nature may even be granted *ex parte*, i.e. on the application of one of the parties without notice to the other (by an order commonly known as an *interim* order) in cases of extreme urgency, where the applicant apprehends irreparable injury (a); but in such cases the Court usually grants relief only until the first day for which a formal notice of motion can be given. Applications of this kind may be made immediately after, but not before, a writ has been issued; and must be supported by evidence in the form of an affidavit showing a *prima facie* case of threatened injury. But, in such cases of apparent urgency, the strict rules of evidence are frequently relaxed; even to the extent of admitting a mere hearsay affidavit, e.g. that of the plaintiff's solicitor, based on a letter or telegram received from his client. The defendant, on the other hand, is protected from improper use of this process by the practice of the Court which, almost invariably, grants relief only upon the terms of the plaintiff giving an 'undertaking in damages'; whereby he is required to undertake, by his counsel, to abide by any order which the Court may make as to damages, in case the Court should thereafter be of opinion that the defendant has sustained any loss by reason of the order made (b). The application is made in open court to the judge to whom the writ has been assigned.

(a) Judicature Act, 1873, s. 25 (8); Ord. LII. r. 3.

(b) *Fenner v. Wilson* [1893] 2 Ch. 656, 658; *Yearly Practice*,

note under s. 25 (8) of the Judicature Act, 1873, "Undertaking in Damages."

But, in all save the most urgent cases, interlocutory relief, where necessary, is obtained on ordinary motion, notice of which may, by special leave obtained *ex parte*, be served together with the writ (a), or, without leave, at any time after the defendant has entered appearance to the writ; two clear days being required (in the absence of special leave to the contrary) to elapse between the service of the notice and the day named for hearing the motion (b). The motion must be supported by evidence given by affidavit; and the defendant usually obtains an adjournment to enable him to file evidence in opposition. But the Court may refuse such an adjournment, except upon terms; as, for example, that the defendant give an undertaking until the further hearing in the terms of the notice of motion to discontinue the acts complained of (c). When the evidence is complete, the Court may of course either grant the relief asked or dismiss the motion; or, if it appear that the matter in dispute cannot conveniently be decided on affidavit evidence, or without pleadings, order the hearing to stand over to the trial of the action. On the other hand, it may, and frequently does (especially in actions where an injunction is the principal relief claimed) appear that justice can be done by treating the motion as the final trial of the action without pleadings; and this is effected by consent of the parties, the hearing of the motion being adjourned to a convenient day, either with or without the condition that either party shall be at liberty to cross-examine the witnesses who have made affidavits on behalf of his opponent. Where the motion is adjourned to the trial of the action, the costs are usually directed to be 'costs in the action,' *i.e.* reserved to abide the result of the trial; and this is often the case, even where interlocutory relief is granted. In granting an interlocutory injunction, the court may, and often does, require the plaintiff to give an undertaking in damages in the

(a) Ord. LII. r. 9.

(b) *Ibid.* r. 5.(c) *Ibid.* r. 7.

terms indicated above for an *ex parte* application (a). Motions being heard in open court, the parties must appear either by counsel or in person ; and cannot be heard by their solicitors.

As in the King's Bench Division (b), the plaintiff in an action in the Chancery Division is allowed to apply, after the defendant has appeared, for an injunction or for the appointment of a receiver ; but, before taking any further or other step, he must issue a SUMMONS FOR DIRECTIONS under Order XXX. The matters included within the scope of such a summons in the Chancery Division are (according to the form of summons given in R. S. C., Appx. K., Form 4d), pleadings, particulars, admissions, discovery (c), interrogatories, inspection of documents, inspection of real or personal property, commissions, examination of witnesses, place and mode of trial, and any other interlocutory matter or thing. On the 'return' or first hearing of the summons, pleadings, to the extent of statement of claim and defence, are ordered in almost every case except where, as explained above (d), a motion for a receiver or an injunction has been treated as the trial of the action. After pleadings have been ordered, the hearing of the summons is then usually adjourned generally ; and subsequently either party is at liberty, at any time before judgment, upon two clear days' notice to his opponent, to apply for any interlocutory relief within the scope of the summons (e). In this way applications are frequently made for further and better particulars of matters stated in an adversary's pleading (f), for discovery of documents (g), and leave to deliver interrogatories (h). In connection with the other matters

(a) See *ante*, p. 590.

(b) See *ante*, pp. 544-545.

(c) *Scil.* of documents. In the language of Ord. XXXI., interrogatories are a form of discovery, *scil.* of facts.

(d) See *ante*, p. 591.

(e) Ord. XXX. r. 5.

(f) Ord. XIX. r. 7.

(g) Ord. XXXI. r. 12. And see *ante*, pp. 558-561.

(h) Ord. XXXI. r. 1. And see *ante*, pp. 560-561. As a rule, the Court defers ordering discovery



within the scope of the summons for directions, applications are less common ; and special directions with regard to the place or mode of trial are practically unknown, as in the ordinary course all actions in the Chancery Division are tried by a judge sitting in the Royal Courts of Justice in London, without a jury.

As in the King's Bench Division, any defendant may, by leave of the court, bring into the action by means of a 'third party notice,' any person, not a party to the action, against whom he claims any right of contribution or indemnity (a).

II. *Pleadings*.—No special regulations for the Chancery Division exist with regard to pleadings ; but it is obvious, that the statement of claim (and, indeed, the pleadings generally) must often, from the nature of the relief sought, be much more complicated and lengthy than is necessary in an action in the King's Bench Division. For example, in an action for specific performance, the statement of claim would allege, *e.g.*, that the defendant agreed to grant a lease to the plaintiff, and has refused to do so ; and the defendant might, in such a case, state in his defence, that the plaintiff, having been let into possession, has broken one of the covenants of the proposed lease ; to which the plaintiff might reply, that he never in fact broke the covenant as alleged, or that, if he did, such breach was waived by the defendant.

Here, perhaps, more frequently than in the King's Bench Division, it occurs that the defendant desires to set up a counter-claim, raising a question between himself, on the one hand, and the plaintiff and additional persons, not parties to the action, on the other. When this is the case, the defendant can join such additional persons by naming them in his defence (b),

in any form until the issues have been defined by the pleadings or otherwise.

(a) Ord. XVI. r. 48. App. B., Form 1. See *ante*, pp. 554-555.

(b) Ord. XXI. r. 11.

and serving upon them a copy of the defence, endorsed with a notice calling upon them to enter appearance to the counter-claim within eight days after service (a). Any person thus made a party to the action must appear, as if he had been served with a writ of summons (b).

In actions to restrain infringement of patent rights—a class of action generally instituted in the Chancery Division—it is necessary to bear in mind the provisions of the Patents, Designs, and Trade Marks Act, 1907 (c), whereby the plaintiff is required to deliver with his statement of claim the Particulars of Breaches, and the defendant, with his defence, Particulars of Objections (d).

As in the King's Bench Division, the defendant may in the Chancery Division pay money into court under Order XXII. (e); but such payments are of less frequent occurrence in the Chancery Division.

Under the present rules of pleadings, the plaintiff is not required to anticipate, in his statement of claim, the case of the defendant (f). And in default of defence (g), judgment may be obtained in the Chancery Division, equally as in the King's Bench Division.

III. *Trial and evidence*.—For practical purposes, it may be assumed that the plaintiff who institutes an action in the Chancery Division desires it to be tried by the only method available in that division, that is to say, by a judge sitting without a jury; and it is expressly provided that all actions which are by the Judicature Act, 1873, specially assigned to the Chancery Division, shall be tried in this way (h). The only means by which the trial by jury of an action instituted in the Chancery

(a) Ord. XXI. r. 12.

(b) *Ibid.* r. 13. As to the practice with regard to delivery of reply or defence to counter-claim in such a case, see Ord. XXI. r. 14, and the note thereon in *Yearly Practice*.

(c) S. 33.

(d) See *ante*, vol. ii. p. 38.

(e) *Ante*, pp. 551–552.

(f) *Hall v. Eve* (1876) 4 Ch. D. 341.

(g) See *ante*, p. 550.

(h) Ord. XXXVI. r. 3.

Division can now be obtained is that of transfer to some other (in most cases the King's Bench) division. If the defendant desires the action to be so tried, he should apply under the summons for directions for the necessary transfer to be made (a) ; and, for all practical purposes, it may be assumed that, failing any such transfer, the action will be tried before a judge of the Chancery Division without a jury.

In the absence of any written agreement between the parties, or any special order of the Court, to the contrary, the evidence at the trial of every action commenced by writ of summons in the Chancery Division is given *vivâ voce*, as in the King's Bench Division (b) ; but the rules contain (c) special provisions for the trial of actions on affidavit (with certain facilities for cross-examination), in all cases where the parties shall in writing so agree. After such an agreement, the action falls within the category described in the cause lists as ' non-witness actions ' ; but such agreements seldom occur in practice.

As regards what is and what is not evidence, the admissibility of evidence, the weight of the evidence when admitted, and generally as regards all the rules of evidence, the Chancery Division is nominally in entire agreement with the King's Bench Division ; though it may be doubted whether the rules are generally applied as strictly in the former division as in the latter.

IV. *Judgment and consequential proceedings.*—(i) *Judgment.*—There is usually a considerable difference between a judgment or order (d) of the Chancery Division and a

(a) The jurisdiction to transfer arises under Ord. XLIX. r. 3.

(b) Ord. XXXVII. r. 1.

(c) Ord. XXXVIII. rr. 25–30.

(d) There is no very satisfactory line of distinction between a judgment and an order ; and the modern tendency is to extend

the use of the latter expression. Before the Judicature Acts, the document recording the more important decisions of the Court of Chancery was commonly called a *decree* ; but now what were formerly called decrees may be called either judgments or orders.

King's Bench judgment; the latter judgment being, usually, for the recovery of a specified sum of money, or the possession of specific land or chattels, whereas, in the Chancery Division, the judgment must be adapted to the nature of the relief sought, which is seldom of so simple a character. And first it is to be noted, that there is nothing in the Chancery Division corresponding to the practice of 'signing judgment' in the King's Bench Division; or at least there is no such thing as an order giving leave to sign judgment. The decision of the Court, whether pronounced at the trial of the action, or on motion for judgment, or otherwise, is finally recorded by means of a single document drawn up in the manner which we are about to explain. But, before doing so, it is convenient to remark here, that the principal cases in which judgment is obtained on motion, as distinguished from the trial of the action, are (a) in default of defence (a), and (b) on admission in the pleadings (b); the latter case being particularly common in actions for partition.

The judgment is drawn up by the Registrar, who is present in court on the day when it is delivered or made, and takes down a note of it in his book. Very frequently, for the assistance of the Registrar in more complicated cases, the court directs the junior counsel for the plaintiff to sign 'minutes' of the judgment; and, in any case, the solicitor of the successful party 'bespeaks' the judgment by leaving at the Registrar's office his counsel's briefs (c) endorsed with a note of the decision, and the 'minutes,' if any, which have been signed by the direction of the court. The Registrar then issues what is sometimes called 'minutes,' but is in reality the draft of the judgment or order; a copy being furnished to each solicitor engaged

And it is usual to call every order, by which the first set of accounts or inquiries in an action is directed (in whatever form the action may have been com-

menced), by the name of judgment.

(a) Ord. XXVII. r. 11.

(b) Ord. XXXII. r. 6.

(c) Ord. LXII. r. 4.

in the case. This draft is settled by the Registrar in the presence of the solicitors; and, subsequently, the judgment or order is 'passed,' *i.e.*, the engrossment, after being duly stamped, is examined and initialled by the Registrar, in the same way (a). The original judgment is then deposited at the 'entering seat'; and an official duplicate is issued in exchange to the solicitor of the successful party (b). With the exception of certain simple orders of procedure, made and drawn up in the judge's chambers (c), all orders made in the Chancery Division are drawn up in the manner just explained. It is to be noticed, moreover, that it is the practice of the Chancery Division to state precisely upon whose application the order is made, and all the parties in whose presence it is made; accounting for any parties to the action who may not have been represented on the application. The common practice of the King's Bench Division, of merely prefacing the order with a recital that it is made 'upon hearing' counsel (or the solicitors as the case may be) 'on both sides,' or 'for all parties,' is never followed in the Chancery Division.

In many cases the judgment, thus delivered and recorded, finally disposes of all matters in dispute; but it frequently happens, both at the trial of an action and also on motion for judgment, that, before justice can be finally administered, accounts and inquiries of varying degrees of complexity have to be taken and made, and often also real or other property directed to be sold. And indeed in some classes of actions (*e.g.* foreclosure and partition among many others), some such accounts and inquiries are almost inevitably necessary. In all such cases, the judgment directs the necessary accounts and inquiries to be taken and made, specifying them clearly in numbered paragraphs (d), and proceeds to direct that the *further consideration* of the action be adjourned, until

(a) Ord. LXII. rr. 7-11.

(b) *Ibid.* r. 2.

(c) Ord. LV. r. 74.

(d) Ord. XXXIII. rr. 3, 7.

the result of the accounts and inquiries has been ascertained and certified.

(ii) *Prosecution of accounts and inquiries.*—If, as almost invariably occurs, the judgment or order is silent (a) as to the manner in which the accounts and inquiries directed are to be taken and made, the subsequent procedure is as follows. After drawing up the order (which expression must in the following remarks be understood to include a judgment) in the manner explained above, the party having the carriage of the order issues a SUMMONS TO PROCEED with the accounts and inquiries directed; and, on issuing such summons, leaves in the chambers of the Judge a certified copy of the order (b). The summons is returnable before one of the Masters (formerly known as ‘chief clerks’) attached to the chambers of the Judge (c); and all subsequent proceedings in chambers in the same action are taken before the same Master.

The first duty of the Master is to ascertain, so far as is possible upon the materials then before him, that all necessary parties are before the court. If it appear that some such are absent, the Master directs the plaintiff, or other party having the conduct of the action (d), to serve the absentees with notice, in proper form, of the judgment or order (e); the effect of the notice being, that the party served is bound by, and is, on entering appearance, at liberty to attend, the proceedings, as if he

(a) It might refer the matter to an official or other referee; but cases of which the Masters attached to the Judge’s chambers are not better qualified to dispose must, obviously, be rare.

(b) Ord. LV. rr. 28, 32, 33. The summons for directions under Ord. XXX. is not available for proceedings after trial (*Brown v. Haig* [1905] 2 Ch. 379).

(c) The business is distributed between the masters according to the letter of the alphabet with which the short title of the action or matter begins.

(d) The conduct may be given to some party other than the plaintiff (Ord. XVI. r. 39).

(e) Ord. LV. r. 36; Ord. XVI. rr. 40–43.

had originally been made a party. When any party so served fails to appear, a memorandum of the service upon him may be entered in the Central Office on proof of the service (a); and thereupon the proceedings continue in default of his appearance. If, as often happens where there are many parties interested, it appears that the interests of the parties can be classified, it is the duty of the party having the conduct of the action to apply for an order that the parties constituting any class similarly interested be represented by the same solicitor (b). The effect of such an order, commonly known as a 'classification order,' is, that any party affected by the order, wishing to be represented subsequently by a separate solicitor, can be so represented only at his own expense.

The Master's next business, with which indeed he may be proceeding before he has completed that which we have just described, is to give directions as to the parties by whom, and the times within which, the evidence necessary to enable him to certify the result of the accounts and inquiries is to be filed. Inasmuch as the form and substance of the accounts and inquiries directed must vary according to the peculiar circumstances and requirements of each particular case, it will be convenient to explain the procedure by means of an example of common occurrence; and as such an example, we may take the form of an order directing a complete series of accounts and inquiries in an administration action given under the Rules of the Supreme Court (c), and assume that the testator, by his will, after giving certain legacies and annuities, bequeathed all his real and personal estate to his executors upon trust for sale, etc., and that the plaintiff in the action is the person beneficially entitled to the ultimate residue of the proceeds of sale, and the defendants the executors and trustees. The form mentioned

(a) Ord. XVI. r. 42. App. G,  
Form 26.

(b) Ord. LV. r. 40.

(c) Ord. XXXIII. r. 7. App.  
L, Form 28.

above, with the additions necessary in the particular circumstances, is as follows :—

This court doth order that the following accounts and inquiry be taken and made ; that is to say—

1. an account of the personal estate not specifically bequeathed of A.B., deceased, the testator in the pleadings named, come to the hands of the defendants, B., C., and D., the executors of the will of the said testator, or any of them, or to the hands of any other person or persons by the order or for the use of the said defendants, or any of them ;

2. an account of the testator's debts ;

3. an account of the testator's funeral expenses ;

4. an account of the testator's legacies and annuities (if any), given by the testator's will ;

5. an inquiry what parts (if any) of the testator's said personal estate are outstanding or undisposed of.

And it is ordered that the testator's personal estate not specifically bequeathed be applied in payment of his debts and funeral expenses in a due course of administration, and then in payment of the legacies and annuities (if any) given by his will.

And it is ordered that the following further inquiries and accounts be made and taken ; that is to say—

6. an inquiry what real estate the testator was seized of or entitled to at the time of his death ;

7. an account of the rents and profits of the testator's real estate received by the defendants B., C., and D., the trustees of the testator's will, or any of them, or by any other person or persons by the order or for the use of the said defendants or any of them ;

8. an inquiry what incumbrances (if any) affect the testator's real estate, or any and what parts thereof ;

9. an account of what is due to such of the incumbrancers as shall consent to the sale hereinafter directed in respect of their incumbrances ;

10. an inquiry, what are the priorities of such last-mentioned incumbrancers.

And it is ordered that the testator's real estate be sold with the approbation of the Judge, free from the



incumbrances (if any) of such of the incumbrancers as shall consent to the sale, and subject to the incumbrances of such of them as shall not consent.

And it is ordered that the money to arise by the sale of the testator's real estate be paid into court to the credit of this action (*short title and reference to record*) to an account entitled "Proceeds of Sale of Testator's Real Estates," subject to further order. And if such money or any part thereof shall arise from real estate sold with the consent of incumbrancers, the money so arising is to be applied, in the first place, in payment of what shall appear to be due to such incumbrancers, according to their priorities.

And it is ordered that the further consideration of this cause be adjourned, and any of the parties are to be at liberty to apply as they may be advised.

It is obvious that, as regards some of these accounts and inquiries, the Master cannot finally certify the result until the whole of the testator's real and personal estate has been converted into cash; and he will therefore direct his attention in the first place to those matters which can be ascertained without delay. Accordingly, with regard to accounts Nos. 2 and 3, he will direct the plaintiff, or other party having the conduct of the action, to prepare the usual form of advertisement for creditors (*a*), and will fix the newspapers in which the advertisement is to be published, and the times within which the claims are to be sent in to the defendants' solicitor, and will direct the defendants to file their affidavit as to the claims received by them pursuant to the advertisements (*b*), and fix the date for adjudication upon the claims.

The last-mentioned date is not of such practical importance as might perhaps be supposed. The present practice is that the parties attend before the Master; and the defendants' solicitor produces an office copy of the defendants' affidavit verifying a list of the claims received, such

(*a*) Ord. LV. rr. 46A, 47. App. L, Form 3.

(*b*) *Ibid.* r. 52. App. L, Forms 5 and 6.

list being divided into two parts, one of which contains particulars of claims proper to be allowed without further evidence, and the other, particulars of those which ought to be proved by the claimants (*a*). The appointment is then adjourned for the first part of the list of claims to be checked by one of the Master's clerks, and for the defendants' solicitor to give notice in the prescribed form (*b*) to the creditors named in the second part of the list to come in and prove their claims by affidavit; a date being fixed by which the evidence is to be filed, and another on which the adjudication is to take place. Any creditors who may be present at this appointment are informed that they need not attend again without further notice (*c*).

Turning now to the other accounts and inquiries, it is clear that, in the first instance at all events, all of them, down to and including No. 8, must, in the circumstances of our example, be answered sooner or later by the defendants; the practice being, for obvious reasons, always to direct the evidence in answer to accounts and inquiries to be filed in the first instance by the party possessing the best means of knowledge, and for the Master to give directions accordingly. But it is also clear that some time must elapse after the testator's death before the defendants can complete their account No. 1, and that the whole of the real estate must be sold before their account No. 7 can be closed. It is usually found convenient, in such a case as this, for the defendants, about the time when they file their affidavit verifying the list of claims received, to file also an affidavit in the form prescribed (*d*), dealing with the other accounts and inquiries, so far as is possible at that date. This affidavit begins with a statement of the testator's personal estate at the date of his death; then come particulars of the funeral expenses; and after that the affidavit verifies

(*a*) Ord. LV. r. 52. App. L,  
Forms 5 and 6.

(*c*) *Ibid.* r. 49.

(*b*) *Ibid.* r. 56. App. L, Form 8. 11.

(*d*) *Ibid.* r. 75. App. L, Form

an account showing all receipts and disbursements in respect of the personal estate down to the date of the affidavit. Naturally the next thing is a statement of the personal estate 'outstanding or undisposed of,' *i.e.* the balance of the testator's personal assets at his death remaining after the transactions shown in the account just mentioned. The affidavit then proceeds to set out particulars of the testator's real estate at the date of his death, and of the incumbrances affecting the same or any and what parts thereof. And, lastly, the deponents verify an account of the rents and profits of the real estate received by them, and of their disbursements in respect thereof.

Upon the filing of this affidavit, the Master has before him particulars, which are seldom substantially inaccurate, of the whole estate upon which the judgment is to operate. But it is open to any party able to do so to 'surcharge' the accounting parties (*i.e.* to prove that they have received more than they admit), or to 'falsify' their accounts by objecting to payments or allowances claimed therein. At this stage, the Master will usually direct notice of the judgment (a) to be served on all the incumbrancers disclosed by the defendants' affidavit; in order that they may come in and prove their incumbrances, and be bound by his findings as to the amounts due to them respectively, and also prove their priorities *inter se*—as to which matters they will have an opportunity of filing such evidence as they may be advised. It is also necessary to ascertain whether or not they will consent to the sale of the portions of the estate affected by their respective incumbrances, free from such incumbrances.

The defendants may at any time, when in doubt as to the best means of realising any part of the estate still outstanding, apply to the Master by summons for his directions; and this is usually done by first entering into a conditional contract to effect the sale, or whatever the transaction may be, and then submitting the contract to

(a) See *ante*, pp. 598–599.

the Master for confirmation. This may be done with regard to real estate as well as personal estate ; but, as regards the former, the Master will generally, in the first instance, prefer to follow the usual routine of sale by auction, which will be described later.

We return now to the account of debts (No. 2). The Master's clerk, to whom the first part of the list verified by the defendants' affidavit has been referred, will usually require the defendants' solicitor to produce for his inspection the actual claims from which the list has been compiled ; and will then direct notice to be given to any creditor who appears to hold a bill, or note, or any other security, to attend before him and produce the same. If the Master's clerk suspects that any claim included in this part of the list is statute-barred, or open to objection on any other ground, he will refer the matter to the Master, who may require notice to be given to the creditor to prove the claim in the manner explained above (a). The defendants, being the testator's executors, are of course entitled to file evidence in opposition to that filed by any creditor who has been required to prove his claim ; but no party other than the executors or administrators of the deceased, will, except by special leave, be entitled to appear on the adjudication of the claim of any person who is not a party to the action (b). Where necessary, the Master will adjourn the adjudication, to enable any creditor to file evidence in reply to that filed in opposition to his claim ; and he will proceed as soon as possible to adjudicate finally upon each claim on the affidavits filed for and against. When he has done so, and the evidence necessary to enable him to certify the result of the other accounts and inquiries is complete, he will 'adjourn for certificate,' i.e. for the draft of his certificate to be prepared by one of his clerks. The Master may (but seldom will) direct the draft certificate to be prepared by the solicitor for one of the parties (c).

(a) See *ante*, p. 602.      (b) Ord. XVI. r. 47.      (c) Ord. LV. r. 66A.

(iii) *Sale by the Court*.—It is now time to consider how the sale of the testator's real estate directed by the judgment is to be carried out. Where, as in this case, the sale is to be 'with the approbation of the Judge,' the procedure is as follows. The party or parties having the conduct of the sale (*i.e.* in the absence of any special order to the contrary, in an action for administration of an estate or execution of the trusts of a deed, the executor, administrator, or trustee (*a*), and, consequently, in this case the defendants) having consulted an auctioneer and, if prudent, satisfied themselves that he will be content with such remuneration for his services as the Court may allow, will file an affidavit by the auctioneer known as the 'affidavit of lotting,' whereby the auctioneer verifies particulars of the property to be sold, either in one lot or several lots, as he may think best (*b*). At the same time, the defendants will file an affidavit made by some independent witness, proving the fitness and integrity of the auctioneer (*c*). On these materials, the Master will fix the auctioneer's remuneration upon a scale graduated according to the amount realised, and will refer the particulars, and an abstract of title brought in by the defendants, to one of the conveyancing counsel of the court (*d*), to settle the draft particulars and conditions of sale, subject to revision by himself. In settling the draft, the conveyancing counsel will frequently leave open certain points to be settled by the Master; and, in any case, the Master must approve the draft and fix the dates for the sale to be held, for his certificate of the result to be settled (in the presence of any purchaser desiring to attend), and for the balance of the purchase moneys to be paid into court (*e*). The most convenient course is for the Master

(*a*) Ord. L. r. 10.

(*b*) Daniell, *Chancery Forms* (5th edn.), No. 1293.

(*c*) Daniell, *Chancery Forms*, No. 1294.

(*d*) Ord. LI. r. 2.

(*e*) For common form of conditions, see R. S. C., App. L., Form 15.

to defer fixing these dates (of which the last two must obviously depend upon the first) until all other points have been finally settled, and then to allow the parties having the conduct of the sale to file the auctioneer's 'affidavit of value,' upon which the Master has to fix the reserve prices. This affidavit clearly cannot properly be made until the conditions have been settled; and, as the auctioneer is responsible for the advertisements of the sale, he should be consulted as to the date and place of it, these being matters of which he is, presumably, the best judge. The affidavit (*a*) must refer, as an exhibit, to the particulars and conditions; and the best plan is to use as the exhibit a proof print with the dates left blank, and let the affidavit contain a paragraph stating the auctioneer's opinion as to the most convenient date and place for the sale.

Upon these materials, the Master can finally settle the particulars and conditions of sale, and fix both the reserve prices and the security to be given by the auctioneer for the deposits which he will receive under the conditions if the property is sold. In order to prevent intending bidders from obtaining information as to the probable amount of the reserve prices, by searching the file of affidavits, the Rules (*b*) provide that the auctioneer shall not disclose his opinion as to the value in the body of his affidavit, but by means of an exhibit. Where it appears to the Master from this affidavit that the total amount to be received by the auctioneer in respect of deposits will not exceed 200*l.*, it is the usual practice to accept an undertaking (*c*) by the auctioneer alone as sufficient security; and, where the amount does not exceed 500*l.*, the security may be given by an undertaking by the auctioneer jointly with sureties or a guarantee society (*d*). In other cases, the auctioneer is required to enter into a

(*a*) For Form, see Daniell, *op. cit.*, No. 1296.

(*b*) Ord LI. r. 4.

(*c*) Daniell, *op. cit.*, No. 1302.

(*d*) Ord. L. r. 16A.

recognisance (a) with two sureties, unless the Master shall see fit to accept one as sufficient, or procure a bond (a) to be given by a guarantee society in double the total amount of the deposits to be received, calculated according to the reserve prices recommended in his affidavit of value. Before the sureties, whether they be private individuals or a guarantee society, are accepted, they must make an affidavit proving the adequacy of their means, or, as it is usually called, an 'affidavit of solvency' (b).

The necessary instructions to the auctioneer are then prepared in the Master's chambers; but their contents are not so important to the practitioner as the fact that the party having the conduct of the sale must not forget to call for them a day or two before the date fixed for the sale, when they will be handed out to him in a sealed envelope addressed to the auctioneer. The papers consist (c) of a printed form of directions to the auctioneer, a copy of the particulars and conditions of sale, and a note of the reserve prices fixed, all signed by the Master, a bidding paper to be filled up and signed by the auctioneer with particulars of the result of the sale, and a form of certificate (d) to be signed by the auctioneer and countersigned by the solicitor for the party having the conduct of the sale, verifying the particulars and conditions of sale and the bidding paper, and giving details of the purchase moneys.

Upon these materials, when completed and returned to his chambers, the Master proceeds to certify the result of the sale; and in due course the certificate is signed and filed (e). After it has become binding (f), the

(a) For forms, see R. S. C., Form 16.  
App. L, Nos. 21, 21A, *mutatis mutandis*.

(b) Daniell, *op. cit.*, No. 1301.

(c) Daniell, *op. cit.*, No. 1304-1307.

(d) Ord. LI. r. 6A. App. L,

(e) The practice as regards the settling, filing, etc., of Master's certificates is described below, pp. 610-612.

(f) See *post*, p. 612.

completion of the sale proceeds as in ordinary cases, down to the point at which the purchaser is ready to pay his purchase money ; and, as regards this, the practice now usually adopted is for the purchaser to bring into the Master's chambers a form of lodgment schedule (a), stating the amount payable for principal and interest, the ledger credit to which it is to be placed, and how, if at all, it is to be invested, also the name and address of the purchaser, and a 'restraint' or 'stop' in his favour, *i.e.*, a direction that the fund is not to be transferred or paid out without notice to him. This schedule is settled in the Master's chambers, in the presence of the solicitor for the party having the conduct of the sale, who checks the directions as to the ledger-credit, investment, etc., and sees that the purchaser is required to accept the title before the schedule is signed. The schedule, when settled, is engrossed and left in chambers for signature by the Master, after which it is transmitted direct to the Pay Office, where, in due course, the purchaser's solicitor can obtain the necessary directions (b) to the Bank of England, Law Courts Branch, to receive the amount payable. Upon receiving the money, the Bank returns the directions to the Paymaster with the addition of a certificate of the receipt (c) ; and the Paymaster then files the complete document or 'certificate of lodgment' at the Central Office, where the purchaser obtains an office copy (d). The sale can then be completed by the purchaser handing to the solicitor for the party having the conduct of the sale, in exchange for the conveyance, the office copy certificate of lodgment in lieu of cash, and also, if so required, as he always should be, an authority to consent on his behalf to the removal of his restraint on the fund (e),

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| (a) Supreme Court Funds                 | in App.                                  |
| Rules 30, and Form 1c in App.           | (c) S. C. F. R. 37.                      |
| (in <i>Annual Practice</i> ) ; Ord. LI. | (d) S. C. F. R. 38.                      |
| 1. 3A.                                  | (e) Daniell, <i>op. cit.</i> , No. 1341. |
| (b) S. C. F. R. 30, and Form 8          |  |



so as to obviate the necessity for service upon him of notice of any subsequent application to deal with the fund.

The deposits received by the auctioneer should be paid into court immediately after the filing of the certificate of the result of sale, by means of a similar lodgment schedule brought in by the solicitor having the conduct of the sale (a). The auctioneer is not allowed to deduct, from the deposits received by him, either his remuneration or his disbursements, both of which are subject to taxation as disbursements in the bill of costs of the party having the conduct of the sale.

The Court has jurisdiction to permit any sale which it has ordered, to be conducted by proceedings altogether out of court; but it can do so only in cases where it is satisfied that all persons interested are before the Court, or bound by the order for sale. And the order authorising the sale to be so conducted must be prefaced by a declaration to that effect, and a statement of the evidence upon which such declaration is made (b); and even then the Court will almost invariably require the reserve prices and auctioneer's remuneration to be fixed by the Master, and the purchase money to be paid directly into court.

Where any sale by auction under an order of the court proves abortive as regards all or any of the lots, the party having the conduct of the sale will, in the first place, endeavour, through the auctioneer or otherwise, to obtain offers to purchase by private contract; and if he receives any offer which he thinks should be accepted, he will enter into a conditional contract with the person making the offer, subject to confirmation by the Court within a specified time. This contract will, of course, contain all the cardinal provisions of the conditions of sale settled by the conveyancing counsel, including those relating to payment into court of the purchase money;

(a) See note under Ord. LI. (b) Ord. LI. r. 1A.  
r. 3A in *Yearly Practice*.

and it will also contain, for the benefit of the purchaser, an engagement by the vendor (*i.e.*, the party having the conduct of the sale) forthwith to apply for and use his best endeavours to obtain the sanction of the Court. The vendor will then apply for such sanction, by summons (a) supported by an affidavit of the auctioneer, alleging the sufficiency of the purchase money, and, if it is less than the reserve price previously recommended by him, accounting for his change of opinion. The order confirming the contract will incorporate the necessary lodgment schedule for payment into court of the purchase-money and deposit. Unless purchasers for all the unsold lots can be found in this way, there is no alternative but to offer the property for sale by auction again, after the lapse of a reasonable time; and it is then necessary to go again through all the routine which has been described above.

(iv) *The Master's certificate.*—We can now return to the consideration of the Master's 'general' certificate of the result of the accounts and inquiries directed by the judgment (b). A copy of the draft can be obtained by the solicitor for the party having the conduct of the action; and the other solicitors engaged can obtain copies from him. The certificate states, in a series of paragraphs numbered to correspond with those in the judgment, the result of the several accounts and inquiries directed by the latter; and each finding is followed by a statement of the evidence upon which it is based (c).

Accordingly, in the circumstances of our example, assuming the estate to be solvent and more than sufficient to pay all legacies, etc., and all the real estate to have been sold with the consent of the incumbrancers, the effect of the certificate will be substantially as follows:—Paragraph 1 will state the amounts respectively received

(a) R. S. C., App. K, Form 70.

(b) See *ante*, pp. 599–601.

(c) Ord. LV. r. 67. App. L, Form 10.

and paid by the executors, and the balance due to or from them, as the case may be. Paragraph 2 will refer to a schedule containing particulars of the testator's debts, including the sums allowed to creditors for the costs of proving their claims, and will, if such is the fact, proceed to state that such debts have been paid and allowed in the executors' account of personal estate. Paragraph 3 will state the amount of the testator's funeral expenses, and the payment, etc., as above. Paragraph 4 will refer to a schedule containing (in separate parts) particulars of the legacies and annuities given by the will, and the extent, if any, to which the same have been paid. In like manner, paragraph 5 will show particulars of the personal estate outstanding; paragraph 6, particulars of the testator's real estate at the time of his death; and paragraph 8, particulars of incumbrances affecting the real estate. Paragraph 7 will deal with the rents and profits of real estate, in the same manner as paragraph 1 has dealt with personal estate; and paragraph 9 will state that all the real estate has been sold, and state the amount of the purchase moneys which have been paid into court.

The draft certificate is settled in the Master's chambers, in the presence of the solicitors for all parties; but it is seldom possible to complete this work at a single sitting. And where, as usually happens, a number of adjournments are necessary, it is common for the bulk of the work to be done in the presence of only the solicitors for the more important parties; the others being summoned to attend only the appointment at which the draft is finally settled. All parties are entitled to attend upon the examination of the engrossment, which is then signed by the Master and transmitted by him to be filed at the Central Office (*a*). Within eight days after the filing of the certificate, any party dissatisfied with any of the Master's findings may apply by summons to vary the same (*a*); but in the absence of any such application within the eight days (or

(*a*) Ord. LV. r. 70.

any special circumstances to justify its being made at a later date (a)), the certificate becomes binding on all parties to the proceedings at the expiration of eight clear days from the date of filing (b). The summons to vary is, like all other summonses in the Chancery Division, returnable in the first instance before the Master; and no evidence beyond that upon which the certificate is founded can be used in support of it, except by special leave. The Master usually adjourns the summons into court, to come on with the hearing of the action on further consideration (c).

(v) *Receivers*.—Before passing on to the next stage of the proceedings, it may be noted here that the form of judgment which we have taken from the Rules of the Supreme Court (d) as our example, does not include the appointment of a RECEIVER—a matter too common to be ignored in the shortest notice of the practice of the Chancery Division. Such a judgment would, wherever necessary, include, and at one time would more often than not have included, the appointment of a receiver; either to get in the testator's outstanding personal estate, or to receive the rents and profits of the real estate, or both. A form of order appointing a receiver is given in Appendix K to the Rules of the Supreme Court (e); but this form is not followed in the Chancery Division. Perhaps the commonest class of case in which a receiver is appointed is that of debenture-holders' actions, and other actions for foreclosure of mortgages; and in such cases the receiver is usually, where expedient, appointed also manager of the defendants' business, but, of course, only where the business is included in the security (f). The application, whether made by interlocutory motion (g), or at the trial of the action,

(a) Ord. LV. r. 71.

(b) *Ibid.* r. 70.

(c) See *post*, pp. 615–617.

(d) App. L, Form 28.

(e) Form 26, J.

(f) *Leney v. Callingham*

[1908] 1 K. B. 79.

(g) See *ante*, pp. 590–591.

must be supported by evidence of the receiver's fitness ; and where, owing to the urgency of the case or otherwise, such evidence has not been obtained, but the Court is satisfied that a receiver should be appointed, it may refer the appointment of a fit and proper person as receiver to chambers, *i.e.*, to the Master, to be ordered by him on application by summons. But, generally speaking, with this exception, the order cannot be made on summons except by consent (*a*).

The substance of the common form of order is, that the Court, upon the plaintiff's undertaking to be answerable for what the receiver shall receive before giving security, appoints a named person (usually an accountant) to receive the rents and profits of the properties comprised in the plaintiff's securities mentioned in the indorsement on the writ of summons, without prejudice to the rights of any other incumbrancers, and (if necessary) to manage and work the business carried on by the defendants ; and, out of the first moneys to be received, to pay the debts due from the said business. And it is ordered that the receiver appointed do forthwith give security pursuant to Order L. r. 16, to the satisfaction of the Judge, and do pass his accounts and pay the balances which shall be certified to be due from him, as the Judge shall direct.

As soon as the order has been entered, the plaintiff issues a summons to proceed, and files in support of it an affidavit containing the best evidence reasonably obtainable as to the nature and value of the property which the receiver is likely to receive. The Master then decides, according to the circumstances, the amount of security to be given, and fixes the times when the receiver is to bring in his accounts ; the first account being usually

(*a*) A clear statement of the practice generally is given in the notes under Ord. L. rr. 16–18 in the *Yearly Practice*. A receiver may be appointed on originating summons in a fore-

closure action commenced by that means, and, in other cases, by consent, either on ordinary summons or on application under the summons for directions.

due six months after the date of the order appointing the receiver, and subsequent accounts at intervals of six or twelve months. The Master may also by this certificate fix the time within which the receiver is to pay into court the balance to be certified as due from him on passing each of his accounts, as, *e.g.*, the fourteenth day after the date of the certificate of passing such account.

All these directions are incorporated in the Master's certificate of the receiver having given security (*a*); which certificate is completed in the manner already explained (*b*), as soon as possible after the security has been given. This process is usually effected by means of a bond by a guarantee society, either with or without a separate recognisance by the receiver (*c*); the approval of the Master being signified by a note in the margin signed by him, and the bond and recognisance, if any, being then transmitted to the General Filing Department of the Central Office. The receiver's salary or allowance (*d*) is fixed by the Master on passing the accounts, usually at a percentage on the receipts; regard being had, of course, to the amount of work involved. The receiver brings in his accounts as they become due, verified by affidavit in the form prescribed (*e*); and the Master proceeds forthwith to certify the result, and the time and manner in which the receiver is to dispose of the balance, if any, due from him (*f*), that is, assuming that all necessary directions in the last-mentioned respect have not been given by the certificate of the receiver having given security.

When the receiver has discharged all his duties (as, for example, when he has got in all the testator's outstanding personal estate, and the real estate, the rents and

(*a*) App. L, Form 21B.

(*b*) See *ante*, p. 611.

(*c*) Ord. L. r. 16; App. L, Forms 21, 21A. (Where the amount does not exceed 500*l.*, the security may now be given by an undertaking of the receiver

jointly with sureties or a guarantee society, pursuant to Ord. L. r. 16A.)

(*d*) *Ibid.* r. 16.

(*e*) *Ibid.* r. 20; App. L, Form 22.

(*f*) Ord. L. rr. 19, 20; App. L, Forms 14, 22, 22A.

profits of which he was to receive, and the business, if any, which he was to manage have all been sold) the Court will, upon the application of the plaintiff by summons, order the receiver to be discharged, and to pass his final account, and to dispose of the balance to be certified due from him thereon as the circumstances may require, and that thereupon the security given by him be vacated. The receiver then proceeds to pass his final account in the manner explained above ; and the result is, that all moneys realised by him are in court standing to the credit of the action, and available for disposal by order to be made on further consideration, or otherwise according to the nature of the proceedings.

(vi) *Further consideration*.—The estate being solvent, and the judgment having merely adjourned the further consideration, without any special directions as to where it is to come on, the hearing will be in court and not in chambers ; and the plaintiff or other party having the conduct of the action will, upon the expiration of eight days from the filing of the Master's certificate, set the action down for hearing or further consideration, by means of a request lodged in the Registrar's office (a) ; and on his default, after waiting six days, any other party may do so instead (a). The hearing cannot take place until ten days after setting down ; and at least six days' notice must be given to all parties (b) except such as, having been served with notice of judgment, have failed to enter appearance (c).

Usually the party having the conduct of the action prepares, and submits to the other parties for approval, minutes of the order which he proposes to ask the court to make. By this means it often happens that the main substance of the order is virtually settled by the

(a) Ord. XXXVI. r. 21 ; App. L, Form 26.

(b) *Ibid.* r. 21 ; App. L, Form 27.

(c) *Re Rolfe* (1894) 70 L. T. 624.

parties out of court ; but where, as generally happens, infants or other persons under disability are concerned, the Court must always satisfy itself of the propriety of the order. The form of the order must of course depend upon the circumstances of the case, and will be such as to complete, so far as is possible at the time, the administration of justice between the parties. Such complete administration may or may not be possible at this stage ; and it may be, and often is, necessary to direct the continuation of some of the accounts, and even perhaps the addition of further accounts and inquiries. In the comparatively simple circumstances of our example, and in the absence of any continuing annuities (for which, of course, provision would be necessary), a final order can now be made. Such an order would contain the necessary directions for taxation and payment of the costs of the action, and, subject to the payment of the costs, and the debts (account 2) and legacies (account 4), if any, remaining unpaid, the payment and transfer to the plaintiff as residuary legatee, of the balances, if any, found due from the defendants under accounts 1 and 7, together with the outstanding personal estate (inquiry 5) and the residue of the proceeds of sale of real estate ; after providing for payment of the incumbrances according to the Master's findings under inquiries 8 and 10, and account 9.

Applications for orders on the further consideration of any cause or matter, where the order to be made is for the distribution of an insolvent estate, or for the distribution of the estate of an intestate, or for the distribution of a fund among creditors or debenture-holders, may be made by summons in chambers (*a*). The practice which obtains in some chambers of entertaining applications for the hearing on further consideration of all matters originating in chambers, is not universal ; and, consequently, all orders made in chambers, and reserving

(*a*) Ord. LV. r. 2 (16).



further consideration, should (unless the case falls within one of the classes just mentioned), if such be the intention, state that the hearing on further consideration is to be in chambers (a).

V. *Execution*.—Although since the Judicature Acts there has been no distinction between the forms available in the Chancery Division and those available in the King's Bench Division, there are some forms which occur so much more frequently in the former Division than in the latter as to call for some special mention here.

First, as regards *attachment* of the person and *committal*. It is now hardly necessary to draw any distinction between these two forms of execution, which are available in cases of contempt of court. Before the Judicature Acts, a man was attached for neglecting to do some act ordered to be done, and committed for doing a prohibited act (b); and the latter offence was considered the more heinous, inasmuch as it was less easily capable of remedy in case of repentance. But now the practice is, in almost all cases, to apply for both processes alternatively. It would be beyond the scope of this work (c) to attempt to specify all the instances in which either process can be applied; but the cases of commonest occurrence in which one or other is available, include the following: (i) disobedience to a judgment or order for the payment of money (d) which falls within the exceptions specified in section 4 (e) of the Debtors' Act, 1869; (ii) disobedience

(a) See note under Ord. LV. r. 2 (16) in *Yearly Practice*.

(b) *Callow v. Young* (1887) 56 L. J. Ch. 690; *Re Evans* [1893] 1 Ch. 259 (where there is a very full note).

(c) A clear summary of the cases is given in the notes under Ord. XLIV. rr. 1, 2 in the *Yearly Practice*.

(d) Ord. XLII. rr. 3, 4.

(e) S-ss. (3) (4). These excep-

tions are (i) default by a trustee or a person acting in a fiduciary capacity, ordered by a court of equity to pay any sum in his possession or under his control, and (ii) default by an attorney or solicitor in payment of costs which he has been ordered to pay, for professional misconduct, or of a sum of money which he has been ordered to pay as an officer of the court.

to a judgment or order requiring any person to do any act other than the payment of money, or to abstain from doing anything (a); (iii) failure of a party to comply with an order for discovery (including interrogatories) or inspection (b); (iv) interference with receivers and other officers of the court in the execution of their duties; and (v) interference with wards of court. But this list is by no means exhaustive; and it should be mentioned, that a judgment or order against a corporation may be enforced by attachment against the directors or other officers (c). It will be seen, that one or other of the two processes is available in case of the breach of almost any injunction; and this form of execution is available in the case of disobedience to either interlocutory or final orders.

The practice requires careful attention; and is as follows. First of all, where the contempt consists of disobedience to a judgment or order requiring any person to do any particular act, such judgment or order must state the time, or the time after service of the judgment or order, within which the act is to be done; and upon the copy of the judgment or order served upon the person required to obey the same there must be endorsed a memorandum to the effect following, viz.: "If you the within-named A. B. neglect to obey this judgment [or order] by the time therein limited, you will be liable to process of execution for the purpose of compelling you to obey the same judgment [or order]" (d). If the order does not state the time within which the act is to be done, before leave to issue a writ of attachment can be given, a supplemental order, commonly known as a 'four-day' order, must be obtained, which will fix a time, usually four days after service. Personal service of the order is not necessarily a condition precedent to the issue of a writ of attachment (e); but practically it

(a) Ord. XLII. r. 7.

(b) Ord. XXXI. r. 21.

(c) Ord. XLII. r. 31.

(d) Ord. XLI. r. 5.

(e) *Kistler v. Tettmar* [1905] 1 K. B. 39.

is so, owing to the difficulty which must be surmounted, of convincing the Court that the party against whom the order was made knew of its existence, and intentionally evaded service (a).

The application is by motion ; notice of which must be served on the respondent personally, whether he has or has not entered appearance in the action (b). The notice must state the grounds of the application ; and together with it must be served copies of any affidavits intended to be used in support (c). There is some authority for the proposition that this last requirement extends to all exhibits mentioned in the affidavits (d) (although such a thing as an omnibus might be an exhibit), and also to the affidavit of service of the notice (e), which obviously cannot have been sworn at the time of the service. These decisions require no comment ; but in the face of them it is wise to serve copies of all exhibits so far as is reasonably possible (f), and a copy of the affidavit of service as intended to be sworn (the jurat being left blank) ; and to add to the notice of motion a statement of the affidavits intended to be used in support, and to the affidavit of service a schedule of the affidavits and exhibits, copies of which are served with the notice. As a rule, the consequence of failure on the part of the applicant to observe any of these formalities is, that the motion is dismissed with costs, without any regard to the merits of the application ; but it is difficult to see why the applicant should be visited with so severe a penalty, or why he should not, as a general rule, be given an opportunity of repairing the irregularity, whatever it may have been. As has been indicated above,

(a) *Re Tuck* [1906] 1 Ch. 696.

(b) *Re Bassett* [1894] 3 Ch. 179.

(c) Ord. LII. r. 4. (But the requirement does not extend to a notice of motion for committal

(*Taylor v. Plinston* [1911] 2 Ch. 605.)

(d) *Rosenbaum v. Belson* [1901] W. N. 124.

(e) *Re Lysaght* [1887] W. N. 23.

(f) See *Carter v. Roberts* [1903] 2 Ch. 312.

the notice of motion will, as a rule, ask that the applicant be at liberty to issue a writ or writs of attachment against the respondent, or, alternatively, that the respondent stand committed to prison, for his contempt, particulars of which will then be stated (*a*). Usually the Registrar will give facilities for the order to be completed within a few hours after it has been made.

Among other forms of execution frequently occurring in the Chancery Division it is necessary to notice *charging orders* (*b*) and *stop orders* (*c*) affecting funds in court ; and, though brief allusion has been made to these in an earlier chapter (*d*), it will be well, as they are of special importance in Chancery practice, to set out a little more fully the procedure with regard to them.

In either case the application is made by an assignee, or creditor, whose assignor or debtor is entitled to some interest (either immediate or in reversion) in the whole or a part of a fund in court. An assignee claiming under an express assignment, whether absolute or by way of mortgage, of the assignor's interest in the fund in court, requires only a *stop order*, *i.e.* an order that the share or interest of the assignor in the fund in court be not transferred or otherwise dealt with without notice to him, the assignee ; and, for the purpose of preserving his priority, the assignee of any interest in a fund in court will always apply for a stop order immediately after the execution of the assignment. A creditor who has no such express assignment must go a step further, in order to secure payment of his debt out of the fund in court ; and, upon obtaining a judgment against the debtor, he may apply for an order that the debtor's share or interest in the fund in court stand *charged* with the payment of the judgment debt, and, further, be not transferred, etc., without notice to him.

(*a*) Daniell, *Forms* (5th edn.),  
No. 990.

(*b*) Ord. XLVI. r. 1.

(*c*) *Ibid.* r. 12.

(*d*) See *ante*, p. 579.

The jurisdiction to make charging orders, which may affect not only funds in court but also any stock or shares not in court, arises under the Judgments Acts, 1838 and 1840 (a) ; but applications for such orders in the Chancery Division almost invariably relate to funds in court. The application for a stop order is made by ordinary summons (b), which must be served upon the assignor ; but a charging order is obtained by a procedure uncommon in the Chancery Division, inasmuch as, in the first instance, an order *nisi* is made on *ex parte* summons, fixing a time when the debtor may appear and show cause against the order being made absolute (c). The object of this practice is, of course, to prevent the debtor from defeating his creditor by assigning his interest in the property on hearing of the creditor's intention to secure it. The order *nisi* is served upon the debtor ; and, unless he succeeds in showing cause to the contrary at the time fixed, an order absolute is then made (d). The Paymaster-General is required to notify, by indorsement on every certificate of fund issued by him, short particulars of every order restraining any dealings with the fund (e) ; and, inasmuch as upon every application for an order dealing with any fund in court, the applicant is always required to produce a certificate of fund, an effective check is thus secured against the risk of any stop order being overlooked.

A charging order can, like any other mortgage or charge, be enforced by sale, but, apparently, not by foreclosure (f) ; and a separate action is necessary for the purpose of enforcing the order (g). But no such action

(a) 1 & 2 Vict. c. 110, ss. 14, 15 ; 3 & 4 Vict. c. 82, s. 1.

(b) Ord. XLVI. rr. 12, 13. App. K, Form 72.

(c) Ord. XLVI. r. 1. App. K, Form 27.

(d) Ord. XLVI. App. K, Form 28.

(e) S. C. F. R. 99. The solicitor

for the applicant should produce the duplicate order to the Paymaster, to be noted in his books immediately after the order has been entered.

(f) *D'Auvergne v. Cooper* [1899] W. N. 256.

(g) *Leggott v. Western* (1884)

12 Q. B. D. 287.

is maintainable until six months have elapsed from the date of the order *nisi* (a). As regards the making of the order itself, a practice similar to that relating to charging orders obtains also in the case of *garnishee* orders, whereby any person indebted to a judgment-debtor may be ordered to pay his debt to the judgment-creditor (b). But such orders are of rare occurrence in the Chancery Division.

A matter of considerable importance to the practitioner in this Division is a *distringas* notice, whereby any person claiming to be interested in any stock or shares standing in the books of a company (*scil.* in the name of another) may, on an affidavit by himself or his solicitor stating that he is so interested, and on filing the same in the Central Office, together with a notice specifying the stock or shares, and stating whether it is intended to stop the transfer of the stock or shares only, or the receipt of the dividends, or both, serve on the company an office copy of the affidavit and sealed duplicate of the notice (c). The effect of the notice is to prevent the company from permitting the transfer of the stock or shares, or paying the dividends thereon, as the case may be, without first giving to the person who issued the notice an opportunity of asserting his claim; which he can do by applying for an injunction within eight days after receiving notice from the company of its intention to deal with the stock, shares, or dividends (d).

Applications for the appointment of a receiver, by way of so-called 'equitable execution,' as a means of enforcing a judgment, occur occasionally in the Chancery Division. This form of relief, which is obtained by motion (e), is available when it is desired to obtain satisfaction of the judgment out of certain specific property (real or personal)

(a) Judgments Act, 1838, s. 14.

(b) Ord. XLV. r. 1. (See *ante*, pp. 578-579.)

(c) Ord. XLVI. rr. 3, 4. App. B, Forms 27, 22.

(d) Ord. XLVI. r. 10.

(e) As to the practice with regard to the appointment of receivers generally, see *ante*, pp. 612-615.

of the debtor, and the ordinary legal execution by *fi. fa.* or by *elegit* is not readily available, in respect of that specific property (a). This mode of execution, however, will not be granted except where the amount of the judgment debt justifies the expense; for it is not 'just or convenient' to incur such expense on a judgment for an inconsiderable amount (b). In all cases where a receiver is appointed by way of equitable execution, the appointment operates to charge the specific property, that is to say, the judgment debtor's interest therein; and, consequently, the order appointing the receiver is expressed to be without prejudice to any existing charge or incumbrance on such property (c). The precise effect of this proceeding is somewhat obscure. On the one hand, it does not make the creditor a secured creditor for the purposes of the Bankruptcy Acts (d), nor does it give him priority over earlier equitable incumbrancers who have not given notice to the holders of a fund (e). On the other hand, it does appear to give him priority over later equitable claims (f); and, in the case of land (g) (though not of personalty) (h), to entitle him to an order for sale under the Judgments Act, 1864.

Secondly, with regard to proceedings in the Chancery Division commenced OTHERWISE THAN BY WRIT OF SUMMONS, the method of institution may be either (i) originating summons, or (ii) originating motion, or (iii) petition. And we will now proceed to consider these

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| (a) <i>Anglo-Italian Bank v. Davies</i> (1878) 9 Ch. D. 275;               | K. B. 557.  |
| <i>Smith v. Cowell</i> (1880) 6 Q. B. D. 78.                               | (e) <i>Arden v. Arden</i> (1885) 29 Ch. D. 709.     |
| (b) Ord. L. rr. 15A-22, and notes thereon, in the <i>Yearly Practice</i> . | (f) <i>Re Marquis of Anglesey</i> [1903] 2 Ch. 727. |
| (c) R. S. C., App. K, Form 26j.  | (g) <i>Ex parte Evans</i> (1879) 13 Ch. D. 252.     |
| (d) <i>Tilling v. Blythe</i> [1899] 1                                      | (h) <i>Ridout v. Fowler</i> [1904] 2 Ch. 93.        |

different methods shortly in the order named ; on the understanding that, except where otherwise stated, the procedure in matters of detail is identical with that described above in connection with actions commenced by writ of summons.

(i) An *originating summons* is defined by the Rules as any summons other than a summons in a pending cause or matter (a). The following tabular statement shows some of the more important causes of action in respect of which relief can be obtained on originating summons, the source of the jurisdiction, and the parties who must in the first instance be before the court, either as applicants or as respondents (b).

Source of jurisdiction.	Subject of application.	Parties to be served (c).
Ord. LV., r. 3 (a)	In matters relating to the estate of any deceased person or the trusts of any deed or instrument— any question affecting the rights or interests of person claiming to be creditor, devisee, legatee, next-of-kin, heir-at-law, or <i>cestui que trust</i> ;	the executor, administrator, or trustee, and one or more of the persons whose rights or interests are sought to be affected.
Ord. LV., r. 3 (b)	the ascertainment of any class of creditors, legatees, devisees, next-of-kin, or others ;	the executor, administrator, or trustee, and any member or alleged member of the class.
Ord. LV., r. 3 (c)	the furnishing of any particular accounts by the executors, administrators, or trustees, and the vouching (when necessary) of such accounts ;	the executor, administrator, or trustee, and any person interested in taking such accounts.

(a) Ord. LXXI. r. 1A.

(b) The court may require other parties to be served (Ord. LV. r. 6).

(c) Ord. LV. r. 5 (unless other-

wise noted). If there are more than one executor, administrator, or trustee, all must be made parties (Ord. LV. r. 5 (h)).



Source of jurisdiction.	Subject of application.	Parties to be served.
Ord. LV., r. 3 (d)	the payment into court of any money in the hands of the executors, administrators, or trustees ;	the executor, administrator, or trustee, and any person interested in such money.
Ord. LV., r. 3 (e)	directing the executors, administrators, or trustees, to do or abstain from doing any particular act in their character as such ;	the executor, administrator, or trustee, and one or more of the persons whose rights or interests are sought to be affected ;
Ord. LV., r. 3 (f)	the approval of any sale, purchase, compromise, or other transaction ;	
Ord. LV., r. 3 (g)	the determination of any question arising in the administration of the estate or trust ;	
Ord. LV., r. 4 (a)	the administration of the personal estate of the deceased ;	the executor, administrator, or trustee, and the residuary legatees or next-of-kin, or some of them.
Ord. LV., r. 4 (b)	the administration of the real estate of the deceased ;	the executor, administrator, or trustee, and the residuary devisees or heirs, or some of them.
Ord. LV., r. 4 (c)	the administration of the trust.	the executor, administrator, or trustee, and the <i>cestuis que trustent</i> , or some of them.
Ord. LV., r. 5A	Foreclosure and redemption of mortgages, whether legal or equitable, with ancillary relief (a).	The mortgagee and all persons interested in the equity of redemption (b).
Ord. LV., r. 9c	Applications under s. 14 (2) of the Finance Act, 1894, as to the proportion of estate duty to be borne by any property or person.	As the circumstances may require.

(a) This does not include an order for personal payment by the mortgagor. Such an order can only be made in an action

commenced by writ of summons.

(b) See Order LV. r. 5B, and the notes thereunder in the *Yearly Practice*.

Source of jurisdiction.	Subject of application.	Parties to be served.
Ord. LIV., r. 1	Any question of construction arising under a deed, will, or other written instrument ( <i>i.e.</i> , not necessarily in the administration of an estate or execution of a trust).	As the court may direct ( <i>a</i> ).
Ord. LV., r. 2 (1)	Applications for payment or transfer of funds in court <i>when there has been a judgment or order declaring the rights, or where the title (scil. of the payees or transferees) depends only upon proof of the identity, or the birth, marriage, or death, of any person (b).</i>	As the circumstances may require, having regard to the credit or account to which the funds are standing.
Ord. LV., r. 2 (2)	Applications for payment or transfer of funds in court not exceeding the value (if stock, the nominal value) of £1000 ( <i>b</i> ).	
Ord. LV., r. 2 (3)	Applications for payment of the dividends on any securities in court, irrespective of amount ( <i>b</i> ).	
Ord. LV., r. 2 (12)	Applications as to the guardianship and maintenance or advancement of infants.	As the circumstances may require.

It must be understood that the foregoing list does not pretend to exhaust the matters which may form the subject of proceedings instituted by way of originating summons; and, in particular, this form of procedure has by sundry statutes, including (among many others) the Solicitors Act, 1843, the Conveyancing Act, 1881, the Settled Land Act, 1882, and the Arbitration Act, 1889, been made available to enforce various provisions therein contained.

As regards the form of the summons. Where the

(*a*) Ord. LIVA. r. 2.

summons, is necessary only

(*b*) Application by originating,  
as distinguished from ordinary

where no previous application  
affecting the funds has been made.

application is made *ex parte*, as it frequently is, *e.g.* in cases of the guardianship and custody of infants, the summons merely states the day and hour when it is returnable, and, as shortly as possible, the nature of the relief sought (*a*); the facts upon which the claim for relief is founded being disclosed, in any application by originating summons, only by the evidence. Where there is a respondent to be served, there are a few cases (*b*), among which may be noted applications under the Solicitors Act, 1843, and the Arbitration Act, 1889, in which the respondent is not required to enter an appearance. In such cases, the form (*c*) differs from that last mentioned in no substantial respect, except that the respondents are named in it. In the great majority of cases, the respondents are named in the summons, and warned that they must enter appearance within eight days after service; in much the same way as in a writ of summons (*d*). Here again, the summons proceeds to state concisely the nature of the relief sought.

The summons is in all cases issued and assigned by ballot to a particular judge at the Writ Department of the Central Office (*e*); and, where no appearance is required to be entered, the date and hour when the summons is returnable are immediately afterwards inserted and authenticated by seal on application at the Master's chambers (*f*). Where an appearance is necessary, the date of the return cannot be fixed until either all appearances have been entered, or the time for entering appearance has expired. If any respondent makes default in appearance, the applicant must obtain from the Central Office, upon production of an affidavit of service, a certificate that no appearance has been entered (*g*); and, when the applicant is in a position to account for each

(*a*) Ord. LIV. r. 4B. App. K, Form 1A.  
Form 1H.

(*e*) Ord. V. r. 9 (*b*).

(*b*) Specified in Ord. LIV. r. 4F.

(*f*) Ord. LIV. r. 4D.

(*c*) App. K, Form 1G.

(*g*) Ord. XIII. r. 15. App. K,

(*d*) Ord. LIV. r. 4B. App. K, Form 1J.

respondent by producing either a memorandum of appearance or a certificate of no appearance, he may bring into the Master's chambers for sealing a notice in the prescribed form (a), fixing the day and hour for attendance. This notice must be served on each respondent not less than four clear days before the return day (a); the service being effected, as regards respondents who have failed to enter appearance, by filing a copy at the Central Office (b). On the return of the summons, the applicant must be prepared to produce an office copy of any notice so filed; and, in order to avoid the necessity of filing further notices, he should see that the summons is adjourned (if at all) to a particular day and hour. Where a respondent who has entered appearance fails to attend on the return of the summons, the hearing must be adjourned to enable the applicant to file an affidavit of service of the notice (c); but may then proceed in the absence of such respondent. With regard to the service of originating summonses upon infant and lunatic respondents, the practice is the same as in actions commenced by writ of summons (d).

In the Chancery Division, every summons, whether originating or ordinary, is invariably returnable in the first instance in the Master's chambers. With the exception of summonses for time, and a few other applications of secondary importance, which may be heard by one of the Master's clerks, the summons is always returnable before the Master himself, and never in the first instance before the Judge, either in chambers or in court. On the return of the summons, the Master will see that the evidence which the parties may desire to file is complete, and will, if necessary for this purpose, adjourn the hearing from time to time, fixing successively the times within which each party is to file his

(a) Ord. LIV. r. 4D. App. K,  
Form 1F.

(b) Ord. LXVII. r. 4.

(c) See Ord. LIV. r. 5.

(d) Ord. IX. rr. 4, 5; Ord.  
XIII. r. 1; *Re Pepper* (1884) 53  
L. J. Ch. 1054.

evidence. The evidence is given exclusively by affidavit ; but any party may, if so advised, apply for an order that any other party who has made an affidavit be required to attend for cross-examination (a). Such an application is made by ordinary summons ; and the examination, if ordered, usually takes place before one of the Examiners of the court (b), who, on completing the examination, transmits the depositions to the Central Office, where they are filed (c). On the subsequent hearing of the principal summons, which will have been adjourned pending the examination, an office copy of the depositions will be produced by the party on whose application the examination was ordered.

In some cases, the Master has no power to dispose of the application himself, but must, when satisfied that the evidence is complete, adjourn it to the Judge, either in chambers or into court. Among other instances of such cases, may be mentioned all applications under Order LV., r. 3, involving any questions of construction of a document or of law (d), also all applications for the appointment of a new trustee (not being merely a trustee for the purposes of the Settled Land Acts), or for a vesting or other order consequential on such appointment, or for general administration, or for the execution of a trust, or for accounts or inquiries concerning the property of any deceased person, or other property held in trust, or the parties entitled to such property (e). There are other instances (f) in which the Master is by the Rules expressly deprived of the power to dispose of the case himself ; and, in addition, the Judge may give directions that any particular class of case is to be heard by him personally. In all other cases, the Master may at his discretion either make such order as he may think right,

(a) Ord. XXXVIII. r. 1.

(e) *Ibid.* r. 15A.

(b) Ord. XXXVII. r. 40.

(f) See Ord. LI. r. 1B ; Ord.

(c) *Ibid.* r. 16.

LV. rr. 10A, 35A.

(d) Ord. LV. r. 15.

or adjourn the matter to the Judge in chambers or into court, either with or without the request of any party. Moreover, in every case, any party so desiring is entitled to have any question brought before the Judge in person (a); and this, generally speaking, without any practical risk of being ordered to pay the costs of the adjournment if unsuccessful.

The question whether the adjournment should be into court or to the Judge in chambers depends mainly upon the nature of the application, and whether or not it is desirable that it should be publicly reported. The principal differences between the two methods of hearing are: that cases heard in chambers are not reported, the hearing being private, and that any party desiring to appeal to the Court of Appeal from a decision in chambers must, unless the Judge grants a certificate that no further argument is required, either have the matter adjourned into court for further argument, or move in open court to discharge the order, before he can serve notice of appeal (b). If the order ultimately made upon the originating summons is such as to require further proceedings to be taken in chambers, the subsequent procedure is precisely similar to that which had been described above in connection with actions commenced by writ of summons (c).

The procedure by originating summons is intended to provide a simple and summary method of administering justice in suitable cases; and, consequently, the Court has always been loth to entertain any subsidiary applications corresponding to the various interlocutory applications which are common in actions commenced by writ of summons, and necessarily tend to complicate the proceedings. It is true that any party to an originating summons may, if so advised, issue a summons for directions under Order XXX. (d); and an order for discovery

(a) *Re Rigg* (1862) 10 W.R. 365.

(b) *Re Pearce* [1899] W.N. 114.

(c) See *ante*, p. 598 *et seq.*

(d) Ord. XXX. r. 1 (d).

or for cross-examination of witnesses might, no doubt, be obtained in this way. But such orders are very rarely sought in matters commenced by originating summons, and then usually by ordinary summons; and cases in which a summons for directions could reasonably be issued must be exceedingly rare. Occasionally a subsidiary application may be necessary to remove the next friend of an infant plaintiff, or the guardian *ad litem* of an infant defendant; but it is at least doubtful whether such an application could be made by notice under the summons for directions. Generally speaking, therefore, the whole matter in dispute is settled upon the hearing of the originating summons itself, without subsidiary applications of any kind.

In actions against executors, administrators, or trustees, founded on breach of trust or wilful default, or where the plaintiff, owing to their failure to render accounts, desires to make the defendants personally liable for the costs of the proceedings, it is generally dangerous to proceed otherwise than by writ; notwithstanding the jurisdiction to order accounts, etc., on originating summons. For the Court has no power, except by consent, to make on originating summons an order for administration founded on breach of trust or wilful default (a); and, consequently, in the common case where the plaintiff, being in total ignorance of the defendants' dealings with the estate, obtains an order for accounts upon originating summons, and upon taking the accounts (perhaps at considerable expense), it appears that the defendants have been guilty of breach of trust or wilful default, the costs of the proceedings, including those of the defendants, will nevertheless usually, if the breach of trust is in the meantime made good, be ordered to be paid out of the estate, that is, out of the plaintiff's pocket, if, as commonly happens, he is beneficially entitled to the residue. In cases of administration of estates or execution of trusts, the Court has

(a) *Dowse v. Gorton* [1891] A. C. 190, 202.

express power (a) to order the application to stand over for a certain time, and that the defendants do in the meantime render to the applicant proper accounts; with an intimation that if this is not done the defendants may be ordered to pay the costs of the proceedings. But it is dangerous, in such circumstances as those indicated above, to place much reliance on this provision.

(ii) *Originating motion* is the method prescribed by various statutes for instituting proceedings to enforce particular provisions thereby enacted. Among the cases of commonest occurrence, may be mentioned applications under the Companies (Consolidation) Act, 1908, to rectify the register of members (b); and for relief from omission to register contracts and mortgages (c); and under the Infants' Property Act, 1830, to sanction the surrender and renewal of leases vested in infants (d).

The notice of motion, which states concisely the nature of the relief sought, and, by a note at the foot, the names, etc., of the respondents to be served, must in the first place, like an originating summons, be assigned by ballot to a particular Judge at the Writ Department of the Central Office (e). The respondents are not required to enter appearance; but they must, of course, be served personally with the notice, and, in the absence of any special provision to the contrary in the Act regulating the proceedings, or in the Rules, two clear days' notice is sufficient (f). The motion is heard in open court; and the procedure, so far as the circumstances admit, is identical with that described above (g), in connection with interlocutory motions in actions commenced by writ of summons.

(iii) *Petition* is not now nearly so common a method

(a) Ord. LV. r. 10A (a).

(b) S. 32.

(c) Ss. 88, 96.

(d) Ss. 17, 31.

(e) Ord. V. r. 9 (c).

(f) Ord. LII. r. 5.

(g) See *ante*, pp. 591–592.



of instituting proceedings as it was before Order LV. rendered the more economical procedure by originating summons available for the extensive range of business which had been noticed above (a). A substantial part of this business would formerly have been the subject of proceedings originated by petition; but now a petition is seldom necessary, except in cases of dealings with funds in court, when the order required cannot be obtained by summons under Order LV., r. 2 (b), and under particular statutes which require that form of procedure. Among the more important cases falling within the latter class, may be mentioned, all applications under the Trustee Act, 1893, except such as can be made by summons under Ord. LV. (c); applications under the Railway Companies Act, 1867 (d), for the appointment of a receiver and manager by way of execution; under the Companies (Consolidation) Act, 1908 (e), to sanction a reduction of capital; and, under the same Act, to sanction an alteration of the memorandum of association (f); under the Lands Clauses Act, 1845 (g), to deal with funds paid into court under the Act; under the Patents and Designs Act, 1907 (h), for revocation of a patent; and under various statutes relating to charities, *e.g.*, the Charitable Trusts Acts, 1853 (i) and 1869 (k).

As regards form, a petition differs considerably from an originating summons; inasmuch as, while the latter states only as concisely as possible the relief sought, a petition begins by stating, like a statement of claim, in numbered paragraphs, the whole of the material facts upon which the application is founded, and concludes with a 'prayer' stating the relief sought, as in an originating summons (l). At the foot of the petition,

(a) See *ante*, pp. 624–626.

(b) See *ante*, p. 626.

(c) Ord. LIVB, r. 2.

(d) S. 4.

(e) S. 47.

(f) Ss. 9, 264.

(g) S. 70.

(h) S. 25.

(i) S. 37.

(k) S. 8.

(l) See Daniell, *Forms*, under 'Petition, Special.'

there must be a statement of the persons intended to be served therewith, or, if such be the fact, that no person is intended to be served (*a*) ; and, in the absence of special leave to the contrary, two clear days must elapse between the service and the day fixed for the hearing of the petition (*b*).

The petition is presented at the office of the Registrars of the Chancery Division, where it is assigned to a particular Judge (*c*) ; and a day is fixed for the hearing, which takes place in open court. The evidence is given by affidavit ; and, as regards the hearing, the practice is generally similar to that described above (*d*) in connection with motions. Where, as often happens, it is necessary for the Court, on the hearing of the petition, to direct accounts to be taken or inquiries to be made in chambers, it is now usual to adjourn the further hearing of the petition itself, until the result of the accounts and inquiries has been certified by the Master. But, substantially, the practice as regards the further hearing is identical with that described above under the heading of ' further consideration ' (*e*).

(*a*) Ord. LII. r. 16.

(*b*) Ord. LII. r. 17.

(*c*) Ord. V. r. 9 (*d*).

(*d*) See *ante*, pp. 590–592.

(*e*) See *ante*, pp. 615–617.

## CHAPTER XV.

OF PROCEEDINGS IN THE PROBATE, DIVORCE, AND  
ADMIRALTY DIVISION.

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THIS division, as has been said (*a*), consists of two judges, one of whom is known as the President (*b*) ; and, in treating of the proceedings in the division, it is necessary to consider separately the three different kinds of business assigned to it by the Judicature Act, 1873.

## I. PROBATE PROCEEDINGS.

The ecclesiastical courts had until 1857 jurisdiction in relation to the granting or revoking of *probate* of wills and of letters of administration ; when this business was taken away from them by the Court of Probate Act (*c*), and vested in the Court of Probate created by that Act. The Court of Probate was abolished by the Judicature Act, 1873 ; and its jurisdiction was vested in the High Court. For the more convenient distribution of business in the High Court probate business was assigned exclusively to the Probate, Divorce, and Admiralty Division.

The business of the Probate Division is to give a title (*i.e.* evidence of the right to represent a deceased person and to deal with his property) to representatives of any person, whether a British subject or not, who has died anywhere, leaving any personal or real estate in England or Wales (*d*). Since the passing of the Land

(*a*) See *ante*, p. 521.

(*b*) Judicature Acts, 1881, ss.

4, 8 ; 1891, s. 2.

(*c*) 20 & 21 Vict. c. 77. (See

*ante*, vol. ii., pp. 305, 309, 317-319.)

(*d*) *In the goods of Coode* (1867)

L. R. 1 P. & M. 449.

Transfer Act, 1897 (a), estates of inheritance in land, other than legal estates in copyholds, vest, as we have seen, in the personal representatives. The primary business, therefore, of the Probate Division is to grant probate, if the deceased has made a valid will, or letters of administration, if he has died intestate, or if he has made a will without appointing an executor, or has appointed a person unwilling or unable to act, or who has died before him. Where the deceased has made a will, the court has to decide which one or more of his testamentary documents, if more than one, should be admitted to probate as constituting his will, and to ascertain whether an executor, willing and able to act, has been appointed by the will. If the deceased has not made a will, or has not appointed an executor or a person willing and able to act as executor, the court has to determine who should be appointed to administer the estate. In most cases, there is no dispute about these matters. The business, therefore, of the court is mainly non-contentious or *common form* business; and this is transacted by the Registrars of the court or their subordinates, at the Principal Probate Registry at Somerset House, London, or at a District Registry elsewhere. From them probate in common form, or letters of administration, may be obtained by or on behalf of personal representatives on *ex parte* application, supported by the necessary evidence upon affidavit.

As regards the contentious business of the court, there are three kinds of action which may be brought in the Probate Division, viz. (i) an action to prove a will *in solemn form*, i.e. *per testes*, (ii) an action to *revoke* a grant of probate or of letters of administration, and (iii) an action to *establish* a claimant's title to a grant of letters of administration.

An action to prove a will in solemn form is usually brought by the executor of the will propounded; but it

(a) 60 & 61 Vict. c. 65, s. 1. (See *ante*, vol. i. pp. 304–305; vol. ii. p. 317.)

may be brought by a legatee or devisee. The object of an action for revocation of probate is to compel the party who has obtained probate to propound the will; and in the result the suit becomes an action for proving the will in solemn form, or for pronouncing against it, or for proving in solemn form another will set up in opposition to that of which probate has been granted.

An action for a grant of administration is called an *interest suit*, and is generally brought where the claimant's right to be appointed administrator depends on questions of legitimacy or pedigree. An action for revocation of letters of administration is brought against the person to whom they have been granted; and its object is to compel him to establish his title to the grant. The result is that the action becomes an 'interest suit.'

If any person, such as any next-of-kin or the heir, having an interest in the estate of a deceased person, desires to oppose the grant of probate or of letters of administration, he must enter in the Principal or a District Registry (as the case may be), a *caveat*. A *caveat* is a formal notice to the Registrar, demanding that nothing be done in relation to the goods of the deceased, unknown to the party who has lodged the *caveat*; inasmuch as he (the 'caveator') is a party interested in the estate. The person whose application for a grant is interfered with by the *caveat*, then applies at the Principal Registry for a form of summons, called a 'warning,' against the 'caveator.' The warning is served on the caveator, and requires him to enter an appearance within six days at the Registry, and set forth his interest in the estate. If the caveator fails to appear, the grant asked for will be issued to the applicant, upon his filing affidavits of the service of the warning upon the caveator, and of search for appearance of the caveator and of his non-appearance (a).

If the caveator does appear to the warning, the matter.

(a) Probate Rules of 1862 (Non-contentious), r. 62.

is entered as a cause in the court book ; and the contentious business is held to have thereupon commenced (a).

A writ is then issued, after an affidavit has been filed verifying the indorsement on the writ. A citation is also sometimes necessary ; and this is, in general, a command issuing from the Principal Registry, ordering the party, against whom it is issued, and on whom it must be served, to appear and do what is required of him—as, for example, to accept or refuse probate or administration, or to bring in the probate or letters of administration, if already granted, or it may be simply ‘to see proceedings,’ that is to say, to become a party to the suit, in order that the decree of the court may be binding on him.

*Action to prove a will in solemn form.*—As this kind of action is the most common and important instance of contentious probate business, it may be useful to give an account of its object and procedure. If it appears likely that the validity of a will may be disputed, or if, for any other reason, the ordinary grant of probate is not suitable to the circumstances of the case, the executor named in the will proceeds to propound it *in solemn form*, i.e., *per testes*. This process is, virtually, an action against all persons likely to dispute the will.

The writ is indorsed with a claim by the plaintiff, as the executor of the last will of the deceased, to have the will established. The indorsement will have been verified by affidavit ; and usually it is ordered to stand as a statement of claim. The defendants, after appearance, plead to it accordingly. The defendants may raise any or all of the following defences :—

- (i) That the will was not duly executed according to the provisions of the Wills Acts (b).
- (ii) That the deceased was not of sound mind, memory, and understanding, at the time of the execution of the alleged will.

(a) Probate Rules of 1862, r. 12 (Contentious Business).

(b) 1837 (1 Vict. c. 26), and 1852 (15 Vict. c. 24).

- (iii) That the execution of the will was obtained by undue influence.
- (iv) That the execution of the will was obtained by fraud, or that some portion thereof was inserted through fraud or forgery.
- (v) That the deceased, at the time of the execution of the will, did not know and approve of the contents.
- (vi) That the document was not intended to operate as a will.
- (vii) That the alleged will has been revoked.

The defendant may also allege, by way of *counter-claim*, that he is the executor of a later will of the deceased, or of an earlier will, which has not been revoked; and, in these circumstances, he may pray that the will propounded may be pronounced against, and that probate of the will which he is setting up may be granted in solemn form.

It is a peculiarity of probate actions that, with every defence, there must be delivered a document which is called the 'Substance of the Case' (*a*). This is a short outline of the facts on which the defendant intends to rely. Where, moreover, a party has pleaded that the deceased was insane when he made the will, particulars of specific instances of delusion must be given before the case is set down for trial; and the party who has pleaded unsoundness of mind will not be allowed at the trial to give evidence of instances of delusion not disclosed in his particulars (*b*).

Sometimes the defendant, in his defence, merely insists upon the will propounded being proved in solemn form; intimating to the plaintiff that he only intends to cross-examine the witnesses produced in support of it (*c*). In that event, the defendant will not be ordered to pay the plaintiff's costs; unless the judge at the trial is of opinion that there was no reasonable ground for opposing the will (*d*).

(*a*) Ord. XIX. r. 25 (*a*).

(*b*) *Ibid*.

(*c*) Ord. XXI. r. 18.

(*d*) See *Davies v. Jones* [1899]

The form essential to the validity of a will, and the general legal capacity of different classes of persons to make wills, have already been explained (a); but, in explanation of the defences above mentioned, it may be well to refer here to certain facts which may invalidate an apparently regular will, and which may be alleged in opposition to a claim of probate in solemn form.

With regard to the testator's capacity to make a will, three essentials are requisite :—

- (i) He must understand the nature of the act of making a will and its effect.
- (ii) He must understand the extent of the property of which he is disposing.
- (iii) He must be able to comprehend and appreciate the claims to which he ought to give effect (b).

The mental capacity of a testator is not *ipso facto* extinguished by the mere existence, in his mind, of insane delusions. The delusions must be such as did or might influence him in the disposal of his property. Thus, a man with a delusion that he has no heart, may nevertheless be competent to make a will; on the other hand, a man with a delusion that his wife intended to murder him, might be found to be so biassed as to be incompetent to make a will containing any proper provisions for her (c).

As regards the defence of *undue influence*, this is not equivalent to unbounded influence. "Influence, to vitiate an act, must amount to force and coercion, destroying free agency. It must not be the influence of affection and attachment; it must not be the mere desire of gratifying the wishes of another; for that would be a very strong ground in support of a testamentary act. Further, there must be proof that the

P. 161; *Spicer v. Spicer*, *ibid.* 38; *Tomalin v. Smart* [1904] P. 141.

(a) See *ante*, vol. ii., pp. 311–316.

(b) *Banks v. Goodfellow* (1870)

L. R. 5 Q. B., at p. 565.

(c) *Boughton v. Knight* (1873) L. R. 3 P. & M. 64; *Smee v. Smee* (1880) 5 P. D., at p. 92; *Pilkington v. Gray* [1899] A. C. 401.



“act was obtained by this coercion—by importunity  
 “which could not be resisted; that it was done merely  
 “for the sake of peace; so that the motive was tanta-  
 “mount to force and fear” (a).

Within eight days of the appearance of the defendant, each party to the action is required to file an affidavit of scripts (b), setting out all the testamentary papers of the deceased, executed or unexecuted, which he has in his possession or power.

In consequence of the wide nature of the issues which may be raised in a probate action, the Court exercises a greater latitude in ordering discovery of documents than in other actions in the High Court, and usually orders discovery of all documents which may throw any light on the issues of fact raised in the defence and substance of case, especially where incapacity, fraud, or undue influence is alleged; because the function of the court is to give effect to the properly expressed wishes of the deceased as to the disposal of his property, and not merely to do justice between the parties to the action.

After the pleadings are closed, the action is set down for trial, and is tried by the Judge alone; unless ordered to be tried with a jury. Where the only question in the suit is, whether the will was duly executed, the action is tried without a jury; but where the issues raised are that the will was obtained by undue influence or fraud, or that the testator had not testamentary capacity, the action is usually, on the application of either party, ordered to be tried with a jury. Where the heir-at-law is a party, he is probably entitled, as of right, if he so insists, to have any issues of fact tried with a jury (c).

The judgment or decree pronounces in favour of the

(a) Williams, *Executors* (10th edn.), p. 32; *Wingrove v. Wingrove* (1885) 11 P. D. 81.

(b) Probate Rules (Contentious), rr. 30 and 31.

(c) Ord. XXXVI. r. 4. But

s. 35 of the Court of Probate Act, 1857, which gave him this right, was repealed by the Statute Law Revision Act, 1892. See also *Burgoine v. Moordaff* (1883) 8 P. D. 205.

will, which is then admitted to probate in solemn form, or pronounces against it. The costs are in the discretion of the Judge, who may order them, or any part of them, to be paid out of the estate of the deceased, or any portion of it (a). An executor who proves the will in solemn form is allowed his costs out of the estate. But the general rule is that costs follow the event (b), and that the unsuccessful party must pay the costs of the action; though this rule is relaxed in his favour, where the litigation has been caused by the confusion or uncertainty of the testamentary papers of the deceased, or if there were reasonable grounds for questioning the execution of the will, or the testator's capacity. In these cases the Judge may, in the exercise of his discretion, order the costs to be paid out of the estate (c).

An appeal lies from the judgment in a probate action to the Court of Appeal, and from thence to the House of Lords, in the same way as from a judgment in an action tried in the King's Bench Division.

The advantage of proving a will in solemn form is, that probate merely in common form, obtained at a Registry without notice to persons who may be benefited under an intestacy, such as the heir-at-law or the next-of-kin, is liable to be revoked at any subsequent date if any such person can prove to the court that the will was not duly executed, or that the testator was not of sound mind, or the like. If, on the other hand, the will is to be proved in solemn form, it is necessary, before probate is granted, that all persons who are interested in the estate of the deceased, should be cited, that is to say, brought before the court. The decree pronouncing in favour of the will propounded is then binding on all such persons,

(a) Ord. LXV. r. 14 (d); *Dean v. Bulmer* [1905] P. 1; *Re Vickerstaff* [1906] 1 Ch. 762.

(b) *Spiers v. English* [1907] P. 122.

(c) *Mitchell v. Gard* (1863) 3 Sw. & Tr. 275; *Brown v. Fisher* (1890) 63 L. T. 465; *Aylwin v. Aylwin* [1902] P. 203.

and is irrevocable ; unless a valid will of later date is subsequently discovered (a), or the decree is shown to have been obtained by fraud (b).

## II. DIVORCE PROCEEDINGS.

Until the year 1857, the business of the Divorce Court, like that of the Probate Court, was transacted by the ecclesiastical tribunals ; but in that year their jurisdiction over these matters, except so far as relates to the granting of marriage licences, was taken away and transferred to the Court for Divorce and Matrimonial Causes (c). This Court was abolished by the Judicature Acts, which vested its jurisdiction in the High Court, and assigned its business to the Probate, Divorce, and Admiralty Division (d).

Proceedings are commenced by filing a *petition*, praying for a decree of (a) restitution of conjugal rights, or (b) judicial separation, or (c) nullity of marriage, or (d) jactitation of marriage, or (e) for a declaration of legitimacy or the validity of a marriage, or (f) for a decree of dissolution of marriage (commonly called 'divorce'). The general nature of these proceedings has been set out in an earlier part of this work (e) ; but as proceedings relating to marriage are of considerable importance, we shall explain them with greater minuteness here.

(a) *Restitution of conjugal rights*.—The Court has power to order one of the parties to the marriage, who has left the other, to return to cohabitation (f). Before this order can be obtained, it is necessary for the injured party to write a friendly letter asking the other to return (g) ; and if there is a refusal or failure to return,

(a) *Priestman v. Thomas* (1884) 9 P. D. 70.

(b) *Birck v. Birch* [1902] P. 130.

(c) Matrimonial Causes Act, 1857 (20 & 21 Vict. c. 85), s. 6.

(d) Judicature Act, 1873, ss. 3, 34. (See *ante*, pp. 518, 520.)

(e) Bk. iii. ch. ii. (See *ante*, vol. ii., pp. 429–435.)

(f) Matrimonial Causes Act, 1857, s. 17.

(g) Divorce Rules, 175 ; *Neumann v. Neumann* (1913) 29 T. L. R. 213.

the Court will make an order for restitution of conjugal rights. If the respondent fails to comply with the order, he or she is deemed to have been guilty of desertion without reasonable cause; and a suit may be forthwith commenced for judicial separation, or, a wife, if her husband has committed adultery, may petition for dissolution of the marriage (*a*). But an order for the restitution of conjugal rights will not be enforced by attachment for disobedience (*b*).

(*b*) *Judicial separation*.—This may be obtained by either party to the marriage, on the grounds of adultery, or cruelty, or desertion without cause for two years and upwards (*c*), or of statutory desertion under the Matrimonial Causes Act, 1884, by failure to comply with a decree for restitution of conjugal rights (*d*). Orders having the effect of a judicial separation may also be obtained in a summary way by a married woman whose husband has been guilty of one or more specified kinds of cruelty towards her, or of desertion or of wilful neglect to maintain her or her infant children (*e*), or by husband or wife in the case of the habitual drunkenness of the other (*f*). But these orders are obtained from the magistrates' courts, and not from the Divorce Division.

(*c*) *Nullity of Marriage*.—A marriage may be declared null and void on the grounds of impotence, consanguinity, affinity, bigamy, want of consent, or non-compliance with the requirements of the *lex loci contractus* as regard the validity of the marriage.

(*d*) *Jactitation of marriage*.—A suit for jactitation of marriage is brought about by a false boasting of one of the parties that he or she is married to the other; whereby a common reputation of their marriage may ensue. If

(*a*) Matrimonial Causes Act,  
1884, s. 5.

(*b*) *Ibid.* s. 2.

(*c*) Matrimonial Causes Act,  
1857, s. 16.

(*d*) 47 & 48 Vict. c. 68, s. 5.

(*e*) Summary Jurisdiction  
(Married Women) Act, 1895, s. 4.

(*f*) Licensing Act, 1902, s. 5.

the petitioner succeeds in the suit, the respondent will be ordered to keep perpetual silence in the matter. Suits of this kind are very rare.

(e) *A declaration of legitimacy*, or of the validity of a marriage or that the petitioner is a natural-born subject, can be obtained on petition under the Legitimacy Declaration Act, 1858 (a), by any person domiciled in England or Ireland, or by any person who claims real or personal estate in England, whose legitimacy is in question; provided that he is a natural-born subject, or that his right to be deemed a natural-born subject depends wholly or in part on his legitimacy, or on the validity of the marriage of his parents or grandparents. The Attorney-General must be made a respondent to the petition.

(f) *Proceedings for dissolution of marriage*.—A husband may obtain a dissolution of his marriage on the ground of his wife's adultery. The grounds on which a wife may obtain a divorce are, adultery of her husband coupled with (a) such cruelty as, without adultery, would entitle her to a judicial separation, or (b) with incest or bigamy, or (c) with rape or unnatural crime, or (d) with desertion for two years or upwards without reasonable excuse (b), or (e) with statutory desertion, or failure to comply with an order of the court to return to cohabitation (c).

Proceedings in a suit for divorce are commenced by filing at the Divorce Registry, at Somerset House, a *petition*, signed by the petitioner, in which the following particulars must be set out:—(1) where and when the parties were married, and where the parties have since cohabited; (2) the issue, if any, of the marriage, with names and ages; (3) the description and place of residence of the husband, and the domicile of the parties as

(a) 21 & 22 Vict. c. 93.

(c) Matrimonial Causes Act,

(b) Matrimonial Causes Act, 1884, s. 5. (See *ante*, p. 644.)  
1857, s. 27.

at the date of the petition ; (4) whether there have been any and, if so, what, previous proceedings in relation to the marriage in the Divorce Division (*a*) ; (5) a general charge stating the matrimonial offences relied on ; (6) specific instances of such offences, with the dates when, the places where, and the person with whom they were committed ; and (7) the amount of damages (*b*), if any, claimed against the co-respondent. The petition then concludes with a prayer that the marriage be dissolved, and that the petitioner may have the custody of the children, if any. The petition must be verified by affidavit, in which the petitioner must swear to the truth of the statements in the petition, in so far as they are facts within his or her personal knowledge, and to his or her belief in the truth of such statements as are not within personal knowledge. The affidavit must further state that no collusion or connivance exists between the petitioner and the other party to the marriage (*c*).

The Court will not grant a divorce unless satisfied that the petitioner is domiciled within the jurisdiction of the court. If the petitioner is the husband, he, whatever his nationality, must have made England his permanent home, and to England, whenever absent from it, he must intend sooner or later to return (*d*). The court is a court for England only, not a court for the United Kingdom, or even Great Britain. For the purposes of jurisdiction, Ireland and Scotland are deemed to be foreign countries equally with France and Spain (*e*) ; and so also are the Channel Islands and the Isle of Man. Wales is, of course, for this, as for most legal purposes, part of England.

A wife's domicile is deemed to be the same as that of

(*a*) Divorce Rules, 219.

(*b*) *Pegler v. Pegler* (1901) 85 T. 649.

(*c*) Act of 1857, s. 41.

(*d*) A fixed residence is only evidence of domicile ; and a man may have several per-

manent residences in different countries.

(*e*) *Yelverton v. Yelverton* (1859) 1 Sw. & Tr. 574 ; *Le Mesurier v. Le Mesurier* [1895] A. C. 517.

her husband ; for on marriage she acquires his domicile, so that, in a petition by a wife, the domicile of the respondent is the important factor. This state of the law as regards the domicile of the wife is sometimes the cause of hardship to her (a) ; unless the Court finds reason to hold that she has regained her English domicile (b).

The petitioner, after filing the petition and affidavit in support, must then extract a citation, signed by one of the registrars of the court, calling upon each person charged to appear and make answer to the petition. A copy of the citation must be served personally, together with a sealed copy of the petition, on the respondent and co-respondent (if any) ; and, if that cannot be done, application must be made to the court, by motion founded on affidavit, for leave to proceed by substituted service (c). The citation may be served out of the jurisdiction without leave (d).

If the petitioner is the husband praying for a dissolution of his marriage on the ground of his wife's adultery, every alleged adulterer *must* be made a co-respondent ; unless the court gives leave to proceed without doing so (e). And if damages are claimed, the alleged adulterer *must* be served with the citation ; unless the court directs otherwise.

After service of the petition, the respondent and the co-respondent (if any) may enter an appearance in the Divorce Registry, and may then file, in the Registry, their *answers* to the petition (f). If the answers contain any counter-charges (g), or if the co-respondent alleges that he did not know that the respondent was a married

(a) *Ogden v. Ogden* [1908] P. 46.

(b) *Stathatos v. Stathatos* [1913] P. 46 ; *De Montaigne v. De Montaigne*, *ibid.* 154.

(c) Divorce Rules, 13, 15.

(d) Act of 1857, s. 42.

(e) *Ibid.* s. 28 ; *Tollemache v.*

*Tollemache* (1858) 28 L. J. P. & M. 2 ; *Bagot v. Bagot* (1890) 62 L. T. 612 ; *Edwards v. Edwards* [1897] P. 316 ; *Saunders v. Saunders*, *ibid.* p. 89 ; *Rayment v. Rayment* [1910] P. 271.

(f) Divorce Rules, 19-22.

(g) *Ibid.* 30.

woman, an affidavit must be filed with them verifying the facts alleged. The affidavit of the respondent must also state that there is not any collusion or connivance between the respondent and the petitioner (a); but the co-respondent is not required to depose as to collusion or connivance.

Where the answers contain any counter-charge, the petitioner may file a *reply* without leave; and the Court may direct that any person with whom the husband is alleged to have committed adultery be made a respondent, and that any person charged with misconduct be allowed to intervene (b). A respondent may always seek a dissolution of the marriage or any less relief, by means of a cross-petition, or by a prayer for such relief in the answer filed by him or her.

The defences to the petition may be divided into two classes: first, *absolute bars*, which, if established, are a complete answer to the petition, so that the Court is bound to dismiss the petition; second, *discretionary bars*, which, if established, are not a complete answer, but leave to the Court a discretion as to granting or refusing the decree (c).

There are three absolute bars (besides disproof of the petitioner's case), viz.: *connivance*, *condonation*, and *collusion*.

(i) *Connivance*.—This means an actual *corrupt* acquiescence beforehand in the respondent's guilt by the petitioner (d).

(ii) *Condonation*.—This is a "forgiveness of the conjugal offence with the full knowledge of all the circumstances; and is a question of fact, not of law" (e). It is a "blotting out of the offence, so as to restore the

(a) Divorce Rules, r. 31.

(b) Act of 1857, s. 28; Matrimonial Causes Act, 1907, s. 3.

(c) Matrimonial Causes Act, 1857, ss. 30, 31.

(d) *Phillips v. Phillips* (1844)

1 Roberts, 145; *Allen v. Allen* (1859) 30 L. J. P. D. & A. 2.

(e) *Peacock v. Peacock* (1858) 1 Sw. & Tr. 183.



“offending party to the same position he or she held “before the offence was committed” (a), but subject to a condition, express or implied, that there shall be no further matrimonial offence (unless the forgiving party expressly excludes any such condition) (b).

A continuance of marital intercourse after knowledge that adultery has been committed, will justify the inference that the offence has been condoned (c); but a subsequent matrimonial offence of the same, or of a different kind, may revive a matrimonial offence previously condoned. (d).

(iii) *Collusion*.—This means an agreement between the parties as to the presentation or prosecution of a petition, whereby they make a bargain as to the withholding, or the disclosure, or the manufacture, of evidence in the case; as, for example, that the respondent shall abstain from defending the suit (e).

There are five discretionary bars, viz. :—

(i) *Adultery of the petitioner*.

(ii) *Unreasonable delay* in presenting the petition.

(iii) *Cruelty of the petitioner*.

(iv) *Desertion*, or wilful separation without excuse before the alleged adultery; and

(v) *Wilful neglect or misconduct*, actually concurring to the adultery complained of.

A few words must be said about each of these.

(i) *Adultery of the petitioner*.—The adultery must have been committed subsequent to the marriage; for all

(a) *Keats v. Keats* (1859) 1 Sw. & Tr. 334.

(b) *Rose v. Rose* (1883) 8 P. D. 98.

(c) As to what amounts to condonation, see *Hall v. Hall* (1891) 64 L. T. 837; *Moore v. Moore* [1892] P. 382; *Williams v. Williams* [1904] P. 145.

(d) *Houghton v. Houghton* [1903] P. 150; *Copsey v. Copsey* [1905] P. 94.

(e) *Lloyd v. Lloyd* (1860) 1 Sw. & Tr. 567; *Bell v. Bell* (1889) 58 L. J., P. D. & A. 54; *Butler v. Butler* [1893] P. 185; [1894] P. 25; *Churchward v. Churchward* [1895] P. 7.

offences of this kind committed previously are obliterated by the marriage. The Court, although by statute it has a discretionary power (a), will not readily grant a divorce to a person who is proved to have committed adultery (b), but it will exercise this power, usually in favour of the wife, in three classes of cases.

- (a) Where there has been a mistake of law; as, for example, where the petitioner, having obtained a decree *nisi*, marries again, before the decree has been made absolute, believing that the marriage was dissolved by the decree *nisi* (c).
- (b) Where there has been a mistake of fact; as, for example, where one of the parties to the marriage, believing that the other party is dead, marries again (d).
- (c) Where there are special circumstances; as, for example, where the wife has been compelled by her husband to lead the life of a prostitute (e).

(ii) *Unreasonable delay in presenting the petition*.—By 'unreasonable delay' is meant a delay of two years after the discovery of the existence of the offence for which the divorce is claimed; and unless a satisfactory explanation can be given of such delay, the petitioner is not entitled to a divorce (f). Want of means, however, is generally considered a satisfactory explanation (g); and consideration for the feelings of others, or for the welfare of a child (h) may suffice. A wife is, in this respect, treated more leniently

(a) Act of 1857, s. 31.

(b) *Stoker v. Stoker* (1889) 14 P. D. 60; *Symons v. Symons* [1897] P. 167; *Evans v. Evans* [1906] P. 125; *Woltereck v. Woltereck* [1912] P. 201.

(c) *Snook v. Snook* [1892] 67 L. T. 389.

(d) *Joseph v. Joseph* (1865) 34 L. J., P. D. & A. 96.

(e) *Coleman v. Coleman* (1866)

L. R. 1 P. & M. 81. And see *Burdon v. Burdon* [1901] P. 52; *Roche v. Roche* [1905] P. 142; *Pretty v. Pretty* [1911] P. 83.

(f) *Nicholson v. Nicholson* (1873) L. R. 3 P. & M. 53.

(g) *Harrison v. Harrison* (1864) 33 L. J., P. D. & A. 44.

(h) *Newman v. Newman* (1870) L. R. 2 P. & M. 57; *Beauclerk v. Beauclerk* [1895] P. 220.

than a husband; because forbearance from taking proceedings may be meritorious in a wife (a).

(iii) *Cruelty of the petitioner*.—By ‘cruelty’ is meant such conduct as results in bodily hurt or injury to health (b), or produces a reasonable apprehension of such hurt or injury (c). The general, but not inflexible, rule is, that the cruelty must have been such as to cause the misconduct complained of in the respondent (d).

(iv) *Desertion or wilful separation*.—Desertion (e), when pleaded as a bar, need not have continued for the space of two years or for any specific period. The act relied on as desertion must, however, in all cases have been done in opposition to the wishes of the person who alleges it (f).

(v) *Wilful neglect or misconduct of the petitioner*.—The principle on which the court acts is, that the neglect or misconduct, to operate as a bar, must *directly* conduce to the adultery complained of (g).

As regards the mode of trial, if damages are claimed by a husband petitioner from the co-respondent, the suit must be tried with a jury, and the damages assessed by it, even though the suit be undefended. In other cases, the cause is heard by the Judge alone; but either party has a right to have any issues of fact tried with a jury, provided that an order for trial before a common or a special jury is duly obtained (h). When a defended cause

(a) *Kirkwall v. Kirkwall* (1818) 2 Hagg. Cons. 277; *Pears v. Pears* (1912) 28 T. L. R. 568.

(b) *Squire v. Squire* [1905] P. 4.

(c) *Russell v. Russell* [1897] A. C., at p. 456, *per* Lord HERSCHELL.

(d) *Pryor v. Pryor* [1900] P. 157. See also *Forsyth v. Forsyth* (1891) 63 L. T. 263.

(e) *Yeatman v. Yeatman* (1870)

L. R. 2 P. & M. 187; *Synge v. Synge* [1900] P. 180; *Hodgson v. Hodgson* [1905] P. 233.

(f) *Ward v. Ward* (1858) 27 L. J., P. D. & A. 63.

(g) *Badcock v. Badcock* (1858) 1 Sw. & Tr. 189; *Symons v. Symons* [1897] P. 167; *Burdon v. Burdon* [1901] P. 52.

(h) Matrimonial Causes Act, 1857, s. 28; Divorce Rules, 40.

is tried with a jury, the questions for the jury are settled before the trial by the Registrar (*a*).

If at the trial facts are established sufficient to entitle a petitioner to a dissolution, then, if there is no bar, the judge must (*b*), or if there is a discretionary bar the judge may (*c*), if he decides to exercise his discretion in favour of the party, pronounce a decree *nisi* in favour of the successful party. A decree *nisi* is an order that the marriage be dissolved, *unless* sufficient cause be shown why the decree should not be made absolute, within six months from the date of the decree *nisi* (*d*).

The King's Proctor, or any other person, wishing to show cause why the decree *nisi* should not be made absolute, may then do so (*e*) on the ground that there has been collusion between the parties, or that material facts were, either intentionally or accidentally, not brought before the Court (*f*), or that the petitioner has committed adultery since the date of the decree; and the King's Proctor may pray that the Court will rescind the decree *nisi*, and order the petition to be dismissed. If, during six months from the date of the decree *nisi*, no such step is taken, notice may be filed in the Registry by the successful party that the Court will be prayed to make the decree absolute (*g*); but if no such notice is given within a reasonable time, the unsuccessful party is entitled to have the decree *nisi* revoked, and the petition dismissed for want of prosecution (*h*), but cannot apply to have the decree made absolute.

No appeal can be brought from a decree absolute by

(*a*) Matrimonial Causes Act, 1857, s. 38; Divorce Rules, 41-43.

(*b*) Matrimonial Causes Act, 1857, s. 30.

(*c*) *Ibid.* s. 31.

(*d*) The Court may abridge the period to not less than three months (Matrimonial Causes Acts, 1860, s. 7; 1866, s. 3).

(*e*) The King's Proctor may *intervene* to allege collusion on, or even before, decree *nisi* (Matrimonial Causes Act, 1860, s. 7).

(*f*) Matrimonial Causes Act, 1860, s. 7; *Howarth v. Howarth* (1884) 9 P. D. 218.

(*g*) Divorce Rules, 207.

(*h*) *Ousey v. Ousey* (1875) 1 P. D. 56.

any party who, having had time and opportunity to appeal from the decree *nisi*, has not done so (*a*) ; but otherwise an appeal lies to the Court of Appeal, within three months from the date of the decree *nisi*, and thence to the House of Lords, within one month after the decision of the Court of Appeal (*b*). Where there is no right of appeal, the parties are at liberty to marry again at any time after the decree absolute (*c*).

A wife, whether petitioner or respondent, is generally entitled to have the costs incurred by her, from the commencement of the suit up to the time of the case being set down for trial, taxed as between party and party, and paid by her husband before the trial (*d*). She is usually entitled also, when the case is so set down for trial, to compel her husband to pay into the Registry, or give security by bond, for a sum fixed by the Registrar as sufficient to cover her costs of and incidental to the hearing (*e*). If she succeeds at the trial, the general rule is that she gets her full costs (*f*) ; and, even if she fails, the sum paid into court or secured by the husband to cover her costs of the hearing is generally ordered by the judge to be paid out to her solicitor (*g*), unless he (*h*) or she (*i*) has been guilty of misconduct in the suit.

A co-respondent may set up in his defence a denial of material facts alleged in the petition, or any other defence available to the respondent, and (as a plea to any damages claimed) that he did not know that the respondent was a married woman (*k*). But where the husband is successful

(*a*) Judicature Act, 1881 (44 & 45 Vict. c. 68), s. 10.

(*b*) *Ibid* s. 9 ; *Cleaver v. Cleaver* (1884) L. R. 9 App. Ca. 631.

(*c*) Act of 1857, s. 57 ; Act of 1868, s. 4.

(*d*) See *Ash v. Ash* [1893] P. at p. 226 ; *Allen v. Allen* [1894] P. 134.

(*e*) Divorce Rules, 158 (*i.e.* for one day, and so on from day to

day).

(*f*) *Waudby v. Waudby* [1902] P. 85.

(*g*) Divorce Rules, 159, 201.

(*h*) *Flower v. Flower* (1873) L. R. 3 P. & M. 132.

(*i*) *Clark v. Clark* (1865) 4 Sw. & Tr. 111.

(*k*) *Lyne v. Lyne* (1867) L. R. 1 P. & M. 508 ; *Lord v. Lord* [1900] P. 297.

in establishing a charge of adultery against the co-respondent, the Court generally orders the co-respondent to pay the whole or part of the costs of the suit; if he knew at the time of the adultery that the respondent was a married woman (a). And he is also liable to be condemned in damages, to compensate the petitioner for the loss or injury he has suffered by the breaking up of the home. The Court has power to order the whole or any part of the damages awarded by the jury to be settled for the benefit of the children of the marriage, or as a provision for the maintenance of the wife (b). In the case of co-respondents, the jurisdiction of the Court does not depend on their domicile or nationality; but they may be duly served and execution can be had against them, at any rate so far as it is available in this country (c).

In a matrimonial cause, a wife, whether petitioner or respondent, may forthwith petition the Court for *alimony pendente lite* (d), (to be distinguished from the *permanent alimony* that may be granted after a judicial separation), for her support during the proceedings, and, after decree *nisi*, for *maintenance* for her support thereafter. On a petition for alimony *pendente lite*, the Registrar, unless the parties agree to a sum, will inquire into the facts. The husband may object that the wife has no need of alimony (e), e.g., that she has separate estate, or is supported by the co-respondent, or that the husband has no income, or is bankrupt. But after inquiry, the Registrar will allot to her such a sum as he thinks fit, having regard to the circumstances of the case and to the conduct of the parties (f). This sum will usually be an amount not

(a) Matrimonial Causes Act, 1857, s. 34. And see *Badcock v. Badcock* (1858) 1 Sw. & Tr. 189; *Codrington v. Codrington* (1865) 4 Sw. & Tr. 63; *Forbes Smith v. Forbes Smith* [1901] P. 258; *Bilby v. Bilby* [1902] P. 8.

(b) Matrimonial Causes Act, 1857, s. 33. And see *Cowing v.*

*Cowing* (1863) 33 L. J. P. D. & A. 149; *Evans v. Evans* [1899] P. 195.

(c) *Rayment v. Rayment* [1910] P. 271.

(d) Divorce Rules, 81–94.

(e) *Ibid.* 87.

(f) *Ibid.* 191.

exceeding one-fifth of the joint incomes of husband and wife (a); and it will be payable until decree absolute, if the wife succeeds, or until she is found guilty of misconduct, if she is unsuccessful. It is not assignable by her, and the court has power to vary the amount if the circumstances alter. After decree *nisi* (b) in her favour (c), the Court may order the husband to secure to the wife to the satisfaction of the Court, a lump sum of money, or an annual payment for a period not exceeding her life, with or without a monthly or weekly sum during their joint lives. This payment will be such as, having regard to the means of the wife and the ability of the husband to pay, and the conduct of the parties, seems reasonable to the Court (d). Where circumstances subsequently change, the amount of periodical payments may be varied by the Court. Where an annual payment is ordered, it will usually be a sum not exceeding one-third of the joint incomes of husband and wife.

After a final decree of dissolution of marriage, the Court may inquire into the existence of settlements, antenuptial or post-nuptial, made on the parties to the marriage, and make such orders with reference to the application of the settled property as it thinks fit, for the benefit of the children (e), or of either of the parties (f). The Court may also, where a wife has been divorced by her husband, order a settlement of her property, or part of it, for the benefit of the husband or children, or of both (g). An application to vary settlements is made by petition (h), which should not be filed before the decree

(a) Or less, if the husband's income is very large, or more if the wife has to support the children.

(b) But within one month after decree absolute.

(c) The Court may require a husband to allow even to a guilty wife a small subsistence. (*Ashcroft v. Ashcroft* [1902] P. 270.)

(d) Matrimonial Causes Act, 1907, s. 1.

(e) Matrimonial Causes Act, 1859, s. 5.

(f) *Ibid.* and 1878, s. 3.

(g) *Ibid.*; and Act of 1857, s. 45; *Midwinter v. Midwinter* [1893] P. 93.

(h) Divorce Rules, 95.

absolute has been pronounced (*a*). The purpose of variation of settlements is not to punish a guilty party, but to protect the interests of the innocent party and of children of the marriage. The court may also, before, or in (*b*) or after (*c*) its final decree, make orders from time to time with respect to the maintenance, custody (*d*), and education of any children of the marriage; until they attain the age of twenty-one years (*e*).

### III. ADMIRALTY PROCEEDINGS.

Before the Judicature Act, 1873, the jurisdiction of the Admiralty Court rested mainly on the antient jurisdiction of the court (principally in cases of collision-damage, salvage, bottomry, and wages), and on the Admiralty Court Acts, 1840 and 1861 (*f*), which extended the antient maritime jurisdiction of the court of the Lord High Admiral. These Acts gave the court jurisdiction to try the following causes relating to ships:—(i) claims for damage done or received by any ship; (ii) claims for salvage remuneration for salvage services rendered to a ship or her cargo, (and this jurisdiction was extended by the Merchant Shipping Acts (*g*) to claims for saving life from a ship); (iii) claims by seamen for their wages, and by the master (*h*) of any ship for wages, or for disbursements made by him on account of the ship; (iv) claims to recover money lent on a 'bottomry bond,' in respect of a ship, or money lent on a 'respondentia bond'

(*a*) *Clarke v. Clarke* [1911] P. 186.

(*b*) Matrimonial Causes Act, 1857, s. 35.

(*c*) Matrimonial Causes Act, 1859, s. 4; Divorce Rules, 97–102, 195.

(*d*) Including access by a guilty parent.

(*e*) *Thomasset v. Thomasset* [1894] P. 295.

(*f*) 3 & 4 Vict. c. 65; 24 Vict. c. 10.

(*g*) Merchant Shipping Act, 1894, s. 544, which consolidates the provisions of ss. 458, 459, and 476 of the Merchant Shipping Act, 1854, s. 9 of the Admiralty Court Act, 1861, and s. 59 of the Merchant Shipping Act, 1862.

(*h*) Merchant Shipping Act, 1894, s. 167.



in respect of cargo (a) ; (v) claims under towage contracts, for remuneration for towage services rendered to a ship ; (vi) claims to recover payment for necessities supplied to a foreign ship, or to any ship, British or foreign, when in a port to which she does not belong, and when no owner is domiciled in England or Wales when the suit is begun ; (vii) claims against a ship for breach of contract of carriage, or for damage to cargo carried by her, provided the cargo has, or ought under the contract to have been, carried into a port in England or Wales (b) and no owner is domiciled in England or Wales ; (viii) claims to recover possession of a ship, or to enforce other rights arising out of the ownership of a ship or share thereof ; (ix) claims to enforce rights arising out of a registered mortgage of a British ship ; (x) claims to enforce rights arising out of an unregistered or equitable mortgage of a British ship, or any mortgage of a foreign ship ; and (xi) claims to recover payment for building, equipping, or repairing any ship ; provided, in each of the two last-mentioned cases, the ship is already under the arrest of the Court, or has been sold in some other previously instituted suit (c).

The jurisdiction in all the cases above mentioned may be exercised under the Acts by proceedings *in rem* or *in personam* ; that is to say, instituted against the *res* (ship, or cargo, or both, as the case may be,) or against the owner of the *res* personally. An action *in rem*, which is made effective against a ship by obtaining her arrest, after issue of a writ in an action *in rem*, is one in which the judgment may be enforced by selling the ship, or proceeding against the bail given to release her from arrest, and is a distinctive and peculiar feature of Admiralty jurisdiction.

(a) As to the nature of these loans, see *ante*, vol. ii., pp. 185-186.

(b) *The Pieve Superiore* (1874) L. R. 5 P. C. 482 ; *The Cap Blanco* [1913] P. 130.

(c) Admiralty Court Act, 1840, s. 3 ; Admiralty Court Act, 1861, s. 4 ; *The Two Ellens* (1872) L. R. 4 P. C. 161.

In the first four of the cases above mentioned, the claimant has a *maritime lien* (a), which is a privileged claim attaching to the *res* to which it relates from the moment of the happening of the cause giving rise to the claim, and continuing to attach to it, notwithstanding any subsequent change of ownership (b), until the claim is satisfied (c); and it is enforceable by the arrest of the *res* in an action *in rem*. In the next three of the cases enumerated above, the claimant has not a maritime lien; but, by reason of the statutory provision above referred to, enabling him to enforce his claim by proceedings *in rem*, he has a statutory right *in rem* (d). Such a statutory right is merely a right to enforce a personal claim against the shipowner by arresting the ship to which the claim relates, and gives no lien on the ship; and the right to arrest is lost, if, between the date of the accrual of the claim and the date of the steps taken to arrest, the ship is sold, even if the sale be to a purchaser who has notice of the claim (e).

An action *in rem* may therefore be defined as a suit instituted against a ship or her cargo to enforce a maritime lien on it or a statutory right *in rem* against it, or to enforce rights arising out of the ownership or mortgage of a ship.

By the Judicature Act, 1873 (f), the High Court of Admiralty was abolished, as has been previously

(a) *The Bold Buccleugh* (1851) 7 Moo. P. C., at p. 284; *The Ripon City* [1897] P. 226; *Currie v. McKnight* [1897] A. C. 97. (The special peculiarity of a maritime, as distinguished from a common law lien, is, that it is independent of possession of the subject-matter.)

(b) *The Kong Magnus* [1891] P. 223.

(c) But in cases of collision and of salvage the Maritime

Conventions Act, 1911 (s. 8) imposes a period of limitation, viz. two years, subject to extension by the Court. (*The Caliph* [1912] P. 213.)

(d) *The Aneroid* (1877) 2 P. D. 189; *The Heinrich Bjorn* (1885) 10 P. D. 44, and (1886) L. R. 11 App. Ca. 270; *Westrup v. Great Yarmouth Co.* (1889) 43 Ch. D. 241.

(e) *The Aneroid*, *ubi sup.*

(f) S. 3.

explained (a), and its jurisdiction was vested in the High Court. For the more convenient distribution of business in the High Court, however, the maritime causes which, before 1875 (b), were within the exclusive jurisdiction of the Admiralty Court, were assigned to the Probate, Divorce, and Admiralty Division. The jurisdiction of the judge sitting to hear Admiralty cases in the Probate, Divorce, and Admiralty Division is, therefore, twofold. As a judge of the High Court, he has all the powers and jurisdiction of any other judge of the High Court; and, subject to the power of transferring any action commenced in the Admiralty Division which ought under the Judicature Acts or the Rules to have been brought in either of the other divisions, he has a concurrent jurisdiction to try any action. In practice, however, the actions *in personam* commenced in the Admiralty Division relate to ships. Secondly, he has, in practice, an exclusive jurisdiction to try actions *in rem*, which, before 1873, could only have been brought in the Admiralty Court. The jurisdiction *in rem* of the Probate, Divorce, and Admiralty Division is the same as that of the High Court of Admiralty before 1873; and rests principally upon the provisions contained in the Admiralty Courts Acts, 1840 and 1861, and the Merchant Shipping Acts, 1894 to 1906 (c).

Most of the actions brought in Admiralty are either actions for damage by collision between ships, or actions for salvage; and it may therefore be useful to explain and illustrate the peculiarities of Admiralty procedure by giving an outline of the various steps in an ordinary action *in rem* for damage by collision, and in an action for salvage.

(a) See *ante*, pp. 517–518.

(b) The date (1st November) at which the Judicature Act took effect.

(c) With the addition of the maritime lien of a master for

wages and disbursements (M. S. A. 1894, s. 167) and of statutory rights *in rem* for loss of life and personal injuries (Maritime Conventions Act, 1911, s. 5).

(a) *Action for damage by collision*.—The writ is issued out of the Central Office or a District Registry, after which it is taken to the Admiralty Registry (a), where an official number is assigned to the cause (b), and wherein subsequent proceedings originate. The parties are usually not mentioned by name, but are described as 'the owners' of the respective ships. Unless the solicitor for the defendant owners gives an undertaking to accept service and to put in bail (c), the writ is served on the ship proceeded against, which must be within the jurisdiction (d). After issue of the writ, the plaintiff may procure the issue of a warrant of arrest; whereupon the vessel will be arrested by the marshal of the Admiralty Court or his substitute (e). From the time the ship is arrested, she is deemed to be in the custody of the court; and it is a contempt of court (f), punishable by fine or imprisonment, to remove or interfere with her. She remains under arrest until her release, which may occur on bail being given for the amount of the claim and costs, or when the claim is satisfied or is dismissed by the court.

The defendants have frequently a cross-claim for their damage by the collision; and they may procure the arrest of the plaintiff's ship by taking similar steps. But if they cannot do so, owing to her not being within the jurisdiction or having been lost, the court, in order to put them on an equal footing to the plaintiffs with regard to security, will stay the action until the plaintiffs give bail or other security for the counter-claim (g).

(a) R. S. C., Ord. V. r. 14.

(b) *I.e.*, its 'folio' number.  
(Cf. Ord. LXVI. rr. 8, 9.)

(c) Ord. IX. r. 10; Ord. XII. r. 18.

(d) *I.e.* in a port in England or Wales, or within three miles from the shore.

(e) Ord. V. r. 16; Ord. IX. r. 11; Ord. XXIX.

(f) *The Petrel* (1836) 3 Hagg. Adm. 299; *The Seraglio* (1885) 10 P. D. 120.

(g) Admiralty Court Act, 1861, s. 34; *The Charkieh* (1873) L. R. 4 A. & E. 120; *The Carnarvon Castle* (1878) 3 Asp. 607. See also *The Rougemont* [1893] P. 275.

Bail in Admiralty actions is usually given in the form of a bond executed by two sureties, who undertake, in the event of the judgment not being satisfied, to pay the amount of it, not exceeding the sum fixed in the bond.

In every collision action, the plaintiff's solicitor is required to file in the Registry within seven days after the commencement of the action, and the defendant's solicitor within seven days after appearance, a document called a 'Preliminary Act' (*a*), containing a short statement of the material facts relating to the collision; and this document is sealed up, and is not open to the inspection of the opposite party until after the pleadings are completed. The object of a preliminary act is, that each party should soon after the occurrence, and at an early stage in the proceedings, set out his version of the facts, before he knows his opponents' version (*b*). Each party is bound at the trial by his Preliminary Act; and the court will not usually allow any material amendment of it (*c*).

Pleadings are usually delivered in a collision action, and consist of a statement of claim, defence, and frequently a counter-claim, and a reply to the counter-claim. Summonses are generally heard by the Registrar, from whom an appeal lies to the Admiralty Judge in chambers.

The action is tried by the Judge, assisted by two of the Elder Brethren of the Trinity House as assessors. The functions of the Elder Brethren are, however, solely advisory, to assist the Judge as experts on all matters of nautical practice and skill; so that witnesses as to such matters are not allowable (*d*). The case is opened without speeches, by calling at once the witnesses for the respective parties; and, after the evidence is closed, the plaintiff's counsel addresses the court, and is

(*a*) Ord. XIX. r. 28.

3 A. & E. 511; *The Miranda*

(*b*) *The Vortigern* (1858) Swa.  
518.

(1882) 7 P. D. 185.

(*d*) *The Koning Willem II.*

(*c*) *The Frankland* (1872) L. R.

[1908] P. 137.

afterwards entitled to reply to the speech of the defendant's counsel. The Judge, after consulting the Elder Brethren, delivers judgment, in which he may pronounce one or both of the ships to blame, or that the collision was the result of some accident, for which neither is responsible, or that the fault attributed to the wrong-doing ship was solely caused by a compulsory pilot, for whose negligence the shipowners are not answerable (a).

The former Admiralty rule as to joint or contributory negligence, whereby, when each of two ships was held to blame for damage by collision, the owner of each ship was liable to bear half the total loss of both ships, is now abrogated (b); and the existing rule is, that where, by the fault of two or more vessels, damage or loss (whether by collision or not) is caused to one or more of them, or to property on board, each vessel shall be liable in proportion to the degree in which she was in fault. But if it is impossible to establish different degrees of fault, the liability is to be apportioned equally (as under the old rule) (c). Where the fault of one vessel is solely due to the default of a compulsory pilot, her owner is not (d) liable to contribute to the damage of the other; but, by reason of the statute, he cannot recover more than the proportion for which the other was to blame, and, although pilotage was compulsory, he will have to bear his own costs (e). The practice is, that only the questions of liability are decided by the Judge at the hearing, and

(a) Merchant Shipping Act, 1894, s. 633. The law as to compulsory pilotage is now in a transitional stage. See *ante*, p. 177.

(b) Maritime Conventions Act, 1911, ss. 1, 9 (3) (repealing Jud. Act, 1873, s. 25 (9)).

(c) *Ibid.* s. 1; *The Rosalia* [1912] P. 109; *The Cairnbahn* (1912) 29 T. L. R. 60; *The Bravo* (1912) 29 T. L. R. 122;

*The Sargasso* [1912] P. 192. In the absence of special circumstances, each of the vessels to blame will still have to pay her own costs (*The Bravo, ubi sup.*).

(d) *The Hector* (1883) 8 P. D. 218.

(e) *The Hector (ubi sup.)*. When compulsory pilotage ceases (in 1918 or earlier) to be a defence at all, a different rule will necessarily be followed.

that the damages are assessed in the Admiralty Registry, by the Registrar and two merchants (a).

An appeal from an Admiralty decision lies to the Court of Appeal, and thence to the House of Lords. Before 1875 (b), it lay from the Admiralty Court to the Judicial Committee of the Privy Council.

(b) *Action for salvage*.—In this action, the plaintiffs are usually the owners, master, and crew of the ship which has rendered the salvage services; and the defendants are the owners of the ship to which the services have been rendered, and of her cargo and freight. And the parties are generally so described in the writ. The steps taken to arrest the salvaged property, or to get bail given for the amount of the claim and costs, are the same as those in a collision action *in rem*.

As the amount of salvage remuneration depends largely on the value of the salvaged property, the proceedings to ascertain the value of the latter are important. The usual practice is for the defendants to file an 'affidavit of values'; and the affidavit is, *prima facie*, conclusive (c). If, however, the plaintiffs consider that the values as sworn are too low, they may obtain an order for the *appraisement* of the property, by one or more valuers appointed by the marshal of the court, whose valuation is final and conclusive (d). The plaintiffs are bound by the defendants' affidavit of values, if an appraisement was possible and they have not required it (e). The question as to which party must pay the costs of appraisement, which are often heavy, depends on whether the appraised values are substantially higher than those sworn to in the affidavit (f). Where there are two or more sets of salvors, and they have issued separate writs, the different actions are consolidated, and ordered to be tried

(a) R. S. C. Ord. LVI.

(b) Jud. Act, 1873, s. 18.

(c) *The Hanna* (1878) 3 Asp.  
503.

(d) *The Georg* [1894] P. 330.

(e) *The Argo* [1895] P. 33.

(f) *The Paul* (1866) L. R. 1  
A. & E. 57.

together ; and the conduct of the consolidated action is usually given to the apparent principal salvor (a).

In a salvage action, the statement of claim sets out particulars of the service rendered, and the nature of the danger or loss from which the defendants' property was thereby saved, and claims such an amount of salvage as may to the court seem just. In the defence, it may be denied that any services of a salvage nature were rendered ; or, while admitting that the services were salvage, it may be contended that the description of them in the statement of claim is exaggerated or untrue. The defendants may also pay money into court by way of tender, with or without a denial of liability ; with a view to getting their costs of the action subsequent to the date of the tender, if it is upheld at the trial.

If the amount of salvage awarded by the court is, together with the plaintiffs' costs of the action, considerably less than the amount of bail demanded by the plaintiffs, the judge will condemn them to pay the defendants' costs of providing bail beyond a reasonable amount. It is not the practice to claim a specific sum as salvage ; but if the amount awarded exceeds the amount for which bail has been given, the claim may, by leave of the Judge, be amended, and, for the balance for which bail has not been given, execution may issue, and the defendants' ship may, like other chattels of the defendants, be seized by the sheriff under a writ of *feri facias*, notwithstanding its previous arrest and release (b).

(a) Ord. XLIX. r. 8 ; *The 304 ; The Gemma* [1899] P. 285 ;  
*Strathgarry* [1895] P. 264. *The Duplex* [1912] P. 8.

(b) *The Dictator* [1892] P. 64,



## CHAPTER XVI.

## OF PROCEEDINGS AFFECTING THE CROWN.

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HITHERTO, we have assumed that all parties to a civil action will be citizens, or, at least, subject persons, whether corporate or individual, native or foreign. And this is a proper assumption, because, in the vast majority of cases, proceedings by or in the name of the Crown are of a criminal nature, and are, indeed, properly described as ‘pleas of the Crown,’ which are dealt with elsewhere in this work (*a*). But it often happens, for various reasons, that the Crown, assuming a private character, will sue a private person in one of its own civil tribunals; and it also sometimes happens, that, with proper reservations, it will submit to be sued as a private person in such tribunals. Naturally, however, such proceedings, by and against the Crown, which nearly always take place in the superior courts, are marked, owing to the prerogative character of the Crown, by certain peculiarities, of which we shall now proceed to give a brief account. And we shall consider, first, those injuries which a subject may suffer from the Crown, and, secondly, those which the Crown may sustain from a subject.

I. *Injuries by the Crown*.—No action of tort can be brought against the King (*b*); but if a Minister or any servant of the Crown commits a tort against a subject of the Crown (*c*), he can be made personally liable. And it

(*a*) See *post*, Bk. vi. (vol. iv.).

(*c*) *Buron v. Denman* (1848) 2

(*b*) *Tobin v. R.* (1864) 16 C. B. Exch. 167.

is no defence for him that the act complained of was done by the command, or with the authority, or on behalf, of the Crown (a).

Moreover, where the Crown obtains or is in possession of real or personal property belonging to a subject, or where a contract made by the Crown is broken, the person aggrieved has a remedy against the Crown by *petition of right*.

The proceedings upon a petition of right are now in practice regulated by the Petition of Right Act, 1860 (b). The suppliant (for the claimant in such proceedings is thus designated) is required to leave at the Home Office a petition for the *fiat* of the Crown that right be done. When this *fiat* has been granted, the petition is returned to the suppliant, who will file it at the Central Office, and serve a copy on the Solicitor to the Treasury; and, if the claim is not admitted, a defence is delivered on behalf of the Crown. The subsequent proceedings are very similar to the course of an ordinary action (c). Judgment, however, cannot be enforced against the Crown by any mode of execution. Costs are payable both to and by the Crown, subject to the same rules, so far as practicable, as obtain in proceedings between subject and subject (d).

II. *Injuries to the Crown*.—Injuries to the Crown may be redressed by the same means as injuries to a subject; but the Crown may obtain redress in certain cases by prerogative modes of process which are peculiarly confined to the Crown. Among these prerogative methods, is that of an *inquest of office* or *inquisition* (e); which is an

(a) *Raleigh v. Goschen* [1898] 1 Ch. 73.

(b) 23 & 24 Vict. c. 34.

(c) The suppliant is not entitled to obtain discovery of documents, or any other discovery (*Thomas v. The Queen* (1874) L. R. 10 Q. B. 44); but

the Crown is (*A.-G. v. Newcastle Corporation* [1897] 2 Q. B. 384).

(d) Petition of Right Act, 1860, s. 12.

(e) Petty Bag Act, 1849, ss. 29–31, 45; Escheat Procedure Rules, 1889; *Doe d. Hayne v. Redfern* (1810) 12 East, 96.

inquiry before a jury, on behalf of the Crown, concerning any matter that may entitle the Crown to the possession of lands or goods, as in the case of treasure trove or wreck, in order to put the title of the Crown upon record.

In order to controvert the possession of the Crown acquired by the finding of such office, the subject may petition for leave to traverse the inquisition (a); or, in the case of real property, under the provisions of the Crown Suits Act, 1865, he is entitled to file a statement of his objection to the finding, and to have the objections inquired into by a fit person as directed by the court. If the return made in writing to the objection differs in effect from the inquisition, the latter is deemed to be altered so as to conform with the return (b).

Upon all debts of record due to the Crown, the King has his peculiar remedy by writ of *extent in chief* (c), under which the body (d), lands, and goods of the debtor may be taken in order to compel the payment of the debt (e); and this proceeding is called an 'extent,' from the words of the writ, which direct the sheriff to cause the lands and goods to be appraised at their full value (*extendi facias*), before they are delivered to satisfy the debt. Crown debts of record include debts due to the Crown on inquisition, obligation under seal, or other specialty (f); debts due from the accountants to the Crown (g); and duties detained in the hands of tax collectors (h).

(a) *In re Ann Parry, Ex parte Duke of Beaufort* (1866) L. R. 2 Eq. 95.

(b) 28 & 29 Vict. c. 104, s. 52.

(c) There are also writs of extent in chief in the second degree, whereby the Crown proceeds against its debtor's debtors; and writs of *extent in aid* whereby it proceeds against such debtors (e.g. sureties) for the ostensible assistance of its debtor.

(d) The sheriff is instructed not to seize the body of the debtor unless specially ordered to do so.

(e) *Harbert's Case* (1584) 3 Rep. pp. 12a, 12b; Gilb. *Ex. C.* 6; 2 Wms. Saund. 70.

(f) 33 Hen. VIII. (1541) c. 39, ss. 37-56.

(g) 13 Eliz. (1571) c. 4.

(h) Taxes Management Act, 1880, ss. 115-118.

A writ of extent, for the recovery of the Crown's debt, commissions the sheriff to take an inquisition (or inquest of office), to ascertain the lands, goods, and choses in action of the defendant, and to seize the same into the hands of the Crown. After the issue of the writ, and inquisition taken, and seizure made under it by the sheriff, the defendant, if he means to dispute the debt, or any third person who claims the property set forth in the inquisition, must enter an appearance for that purpose, when he will be permitted to plead to the extent; and, issue thereon having been joined either in law or in fact, the matter is decided according to the ordinary course of practice in actions between subject and subject. No inquisition or other record, however, is necessary where, on an affidavit of 'debt and danger' (*i.e.* that immediate steps are necessary to enable the Crown to recover an existing debt), the Court authorises the issue of a writ of *immediate* (or *sudden*) *extent* (*a*).

There is also a writ of extent, which is applicable in the event of the death of a Crown debtor, and is called a *diem clausit extremum*, because it recites the death of the debtor (*b*). By this writ, which issues on an affidavit of the debt and death, the sheriff is commanded to take and seize the chattels, debts, and lands of the debtor who has so died, into the hands of the Crown (*c*).

[An *information* on behalf of the Crown, exhibited by the Attorney-General, is also a method for obtaining satisfaction in respect of an injury to any of the possessions of the Crown (*d*). It is an action to redress a civil injury by which the property of the Crown is affected, differing in this respect from the criminal information which is

(a) Crown Suits Act, 1865, s. 47.

(b) *R. v. Hodge* (1823) 12 Price, 537; *R. v. Hassell* (1824) 13 Price, 279; *R. v. Lord Crewe* (1836) 5 Dowl. 158.

(c) 25 Edw. 1 (1297) c. 18;

Crown Suits Act, 1865, s. 47; *R. v. Pridgeon* [1910] 2 K. B.

543.

(d) *A.-G. v. Edmunds* (1868) L. R. 6 Eq. 381; *Stanley v. Wild* [1900] 1 Q. B. 256.

[filed in the King's Bench Division of the High Court, to punish some misdemeanor immediately affecting the Crown, such as cannot be properly left to a prosecution by way of indictment (*a*). The most usual informations in civil cases are those of intrusion (*b*), and of debt (*c*); the information of *intrusion* being for any trespass committed on the lands of the Crown (*d*) (as by entering thereon without title, holding over after a lease is determined, taking the profits, cutting down timber, and the like), and the information of *debt* being for moneys due to the Crown upon the breach of a penal statute (*e*). This civil information is also commonly used to recover forfeitures occasioned by breach of the revenue laws.

There is also an information *in rem*, when any goods are supposed to become the property of the Crown, and no man appears to claim them or to dispute the Crown's title; as, antiently, in the case of treasure-trove, wrecks, waifs, and estrays, seized by the Crown's officer for its use. For, upon such seizure, an information may be filed in the King's Bench Division; and thereupon a proclamation is made for the owner (if any) to come in and claim the effects. At the same time, a commission of *appraisement* issues, to value the goods in the officer's hands; and, after the return of the commission, and a second proclamation had, if no claimant appear, the goods are supposed derelict, and are condemned to the use of the Crown (*f*).] An information is a mode of enforcing a claim by the Crown which is not a matter of

(*a*) See *post*, bk. vi. ch. xiv. (vol. iv., pp. 312–317).

(*b*) *R. v. Sadlers' Co.* (1588) 4 Rep. 58 a; *A.-G. v. Parsons* (1836) 2 M. & W. 23; *A.-G. v. Dakin* (1870) L. R. 4 H. L. 338.

(*c*) *A.-G. v. Bradlaugh* (1885) 14 Q. B. D. 667.

(*d*) *A.-G. v. Donaldson* (1842) 10 M. & W. 117; *A.-G. v. Lord Churchill* (1841) 8 M. & W. 171;

*A.-G. v. Hallett* (1847) 1 Exch. 211.

(*e*) See Crown Debts Act, 1801 (41 Geo. 3, c. 90), and Queen's Remembrancer Act, 1859 (22 & 23 Vict. c. 21), s. 24, as to enforcing payment of Crown debts recovered in the various parts of the United Kingdom.

(*f*) Gilb. *Exch.* ch. 13.

record (a). There may be informations at law, to recover debts, penalties, duties, or damages for breach of contract, or informations in equity, on the revenue side of the King's Bench Division. The former are technically known as 'Latin informations,' the latter as 'English informations' (b).

Finally, we may remark, that the costs in all civil proceedings, by or on behalf of the Crown in matters relating to the public revenue, are now upon the same footing as in actions between subject and subject (c), so that the costs are in the discretion of the Court; and that, by the Crown Office Rules, 1906 (d), Order LXV. of the Supreme Court, as to costs, is to apply to all civil proceedings on the Crown side. The proceedings by way of information, and in other matters relating to the revenue, are similar, in many respects, to the procedure in an action (e).

(a) *A.-G. v. Sewell* (1838) 4  
M. & W. 77.

(b) 28 & 29 Vict. c. 104,  
ss. 6, 31.

(c) Crown Suits Act, 1855 (18  
& 19 Vict. c. 90), ss. 1, 2.

(d) R. 261.

(e) Ord. I. r. 1; Crown Suits  
Act, 1865, Pt. II.; Ord. LXVIII.  
r. 2; Crown Office Rules, 1906,  
rr. 129, 206-208, 232, 259-264.

## CHAPTER XVII.

## OF THE MODERN COUNTY COURTS.

WE have now to deal with the subject of courts of inferior or limited jurisdiction, of which by far the most important are the modern statutory county courts which cover the whole of England. To these we will, accordingly, devote the present chapter, reserving other courts of inferior jurisdiction to a subsequent chapter.

Before the creation of the modern county courts in 1846, the principal inferior courts of civil jurisdiction were the court baron (*a*), which was a court incident to every manor in the kingdom; the hundred court (*b*), which was a larger court baron held for all the inhabitants of a particular hundred; and the sheriff's county court, which was the principal court of civil jurisdiction in the kingdom, until practically superseded by the assize courts. These inferior courts had jurisdiction to try actions relating to land before *real* actions were abolished (*c*); and to try personal actions for the recovery of debts or damages under forty shillings (*d*). Their procedure was, however, expensive and dilatory; and attempts were accordingly made, in a few of the chief centres of population, to supply the much-felt want of

(*a*) 4 Inst. 268.

(*b*) *Bradley v. Carr* (1841) 3 Man. & G. 221.

(*c*) By the Real Property Limitation Act, 1833 (3 & 4 Will. 4), c. 27. But, in effect, the jurisdiction of the local courts to try real actions had

disappeared centuries before the passing of that statute.

(*d*) This restriction was the illogical, though natural result of the wording of the Statute of Gloucester in 1278 (6 Edw. 1, c. 8).

local courts for the speedy and cheap recovery of small claims, by the establishment of *courts of request* (a). The first was created in the City of London in the reign of James I.; and by the year 1841 a little over a hundred of such local courts had been established in various parts of the kingdom, with jurisdiction in claims for debt or damages varying in amount from forty shillings to 15*l*.

But these courts proved to be inadequate and unsatisfactory; chiefly because their jurisdiction was confined to sums of too trivial an amount, or restricted to particular places and to small districts. In 1846, after various unsuccessful attempts by successive Parliaments to deal with the problem of local courts, the first County Courts Act was passed (b), establishing the modern county courts, which have superseded most, though not all, of the more ancient inferior courts of civil jurisdiction. After 1846, the jurisdiction of the county courts was extended by several statutes, which, with the original Act of 1846, were repealed, and their provisions consolidated, by the County Courts Act, 1888, the principal Act now in force relating to County Courts, though the jurisdiction conferred by the Act of 1888 has since been extended by the County Courts Act, 1903. In accordance with the provisions of the principal Act, England and Wales are mapped out into more than fifty circuits comprising an aggregate of nearly five hundred courts. For each circuit a judge is appointed by the Lord Chancellor; and for each court in the circuit a registrar is appointed by the judge, with clerks and subordinate officers and bailiffs to transact the business of the court.

We shall now proceed to consider the jurisdiction of a county court under the Act of 1888, as extended by the Act of 1903; and we shall then proceed to give an outline of the procedure in an ordinary county court action.

(a) These courts were abolished 1847, which was subsequently in effect, subject to a few exceptions, by the County Courts Act, 1846, and the Order in Council, issued under its authority.

(b) 9 & 10 Vict. c. 95.



First, as to the jurisdiction in *common law actions*. The court has jurisdiction in all personal actions founded on contract or tort, (except actions for breach of promise of marriage, libel, slander, or seduction (a);) provided the claim is not for more than 100*l.* (b). If the claim exceeds 100*l.*, the court has no original jurisdiction to try the action, except by consent of the parties; but the claimant may bring his action in the county court by abandoning at any time the excess of his claim over 100*l.* (c). He cannot, however, after judgment, bring another action to recover the abandoned excess; nor can he divide his cause of action and bring two or more actions for amounts within the limit. But, if he has two or more distinct causes of action against the same defendant, he may bring separate actions in respect of them, and thus divide his total claim (d).

It may be here observed, that there is no obligation on any person not to bring in the High Court an action which could be brought in a county court; but a plaintiff runs the risk of being deprived of costs if he recovers in the High Court a sum within the limit of the county court jurisdiction. Thus, if the plaintiff in an action brought in the High Court on contract recovers less than 20*l.*, or in an action on tort he recovers less than 10*l.*, he will not be entitled to *any* costs of the action; and if on contract he recovers 20*l.* or more, but less than 100*l.* (e), or on tort recovers 10*l.* or more, but less than 20*l.* (f), he will not be entitled to recover any more costs than he would have been entitled to if the action had been brought in a county court; unless, in any of the cases above-mentioned, the judge who tries the action certifies that

(a) Act of 1888, ss. 56, 57.

(b) Act of 1903, s. 3.

(c) Act of 1888, s. 81; and see County Court Rules, Ord. VI. r. 1; *Creswell v. Jones* (1912) 28 T. L. R. 395.

(d) Act of 1888, s. 81.

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(e) Act of 1888, s. 116; Act of 1903, s. 3; *Millington v. Harwood* [1892] 2 Q. B. 166; *Duxbury v. Barlow* [1901] 2 K. B. 23.

(f) *Sachs v. Henderson* [1902] 1 K. B. 612; *Doherty v. Thompson* (1906) 94 L. T. 626.

there was sufficient reason for bringing the action in the High Court instead of the county court (*a*). And the county court judge may, irrespectively of the amount recovered, award costs on a higher scale than that which would otherwise be applicable; if the action involves a novel or difficult point of law, or if the question litigated is of general or public interest (*b*).

In actions of *replevin*, which are generally brought in cases of wrongful distress for rent, the county court has jurisdiction up to any amount (*c*). But if the rent in arrear, or the value of the goods seized, exceeds 20*l.*, or there is good ground for believing that the action will involve a question of title to land of which the yearly value or rent exceeds 20*l.*, the plaintiff may bring the action in the High Court, or the defendant may, on application by summons to a Master in chambers in the King's Bench Division, and on giving security for costs, obtain an order removing the action from the county court to the High Court (*d*).

In actions for the recovery of land or tenements, the county court has jurisdiction where neither the annual value nor rent of the property in dispute exceeds 100*l.* (*e*). There are two classes of action to be considered under this head; namely, actions by landlords for the recovery of possession of small tenements from their tenants, and ordinary actions of ejectment. The first class comprises cases where a tenant holds over or refuses to give up possession after the due determination of his tenancy by the expiration of the term or lease or by notice to quit (*f*), and cases where the landlord has by law a right to re-enter and obtain possession on the ground of non-payment

(*a*) Act of 1888, s. 116. And see *Haycocks v. Mulholland* [1904] 1 K. B. 145.

(*b*) Act of 1888, s. 119.

(*c*) *Ibid.* ss. 133–137.

(*d*) Act of 1888, s. 137.

(*e*) *Ibid.* ss. 5, 9, 138, 139;

Act of 1903, s. 3. It seems to be clear that the value of the 'property' means the value of the fee simple, not merely of the interest in dispute. (*Angel v. Jay* [1911] 1 K. B. 666.)

(*f*) Act of 1888, s. 138.

of rent (a), and can prove that the rent is six months in arrear, and that there is no sufficient distress on the premises to satisfy the arrears. An ordinary action of ejectment (b) is an action brought to try the title to land ; and all persons in whom the title is alleged are made plaintiffs, and all the persons in possession of the property sought to be recovered are made defendants.

It may be here observed, that a county court has no jurisdiction, except by consent of the parties, to try any action in which the title to any toll, fair, market, or franchise comes in question (c). Thus it has been held that there is no jurisdiction in a county court to try an action for infringement of patent, in which the validity of the patent is disputed (d).

A county court has also, under its common law jurisdiction, power to try an action brought to recover the balance of a partnership account, or any legacy under a will, or the distributive share of personal estate under an intestacy ; provided in each case that the amount claimed does not exceed 100*l.* (e).

A county court has, moreover, power to try *any* common law action ; where the parties so agree by a memorandum signed by them or their solicitors (f). But if an action is commenced in the county court over which the court has no jurisdiction, the judge must, unless the parties consent to the court having jurisdiction, order it to be struck out (g).

Second, as to the *equitable jurisdiction* of the county court. A county court has concurrent jurisdiction with the High Court in the following actions, provided the

(a) Act of 1888, ss. 138, 139 ;  
Cty. Ct. Rules, Ord. V. r. 3.

(b) Act of 1888, s. 59.

(c) *Ibid.* ss. 56, 61 ; *General Estates Co. v. Beaver* [1912] 2 K. B. 398.

(d) *Tomkins v. Jones* (1889) 22 Q. B. D. 599 ; *R. v. Halifax C. C.*

[1891] 2 Q. B. 263.

(e) Act of 1888, s. 58 ; Act of 1903, s. 3.

(f) Act of 1888, s. 64 ; *Wadsworth v. Queen of Spain* (1851) 20 L. J. Q. B. 491.

(g) Act of 1888, s. 114.

amount of the estate, property, or sum involved does not exceed 500*l.* (*a*), viz.:—administration suits (*b*), actions for the execution of trusts (*c*), for foreclosure or redemption of mortgages, for the dissolution of partnerships, for specific performance or rectification of agreements for the sale or lease of any property (*d*), for relief against fraud or mistake, and proceedings relating to the maintenance of infants, or under the Trustee Acts. In all such actions and matters, the county court judge has all the powers of a judge of the Chancery Division (*e*); including the power to grant injunctions (*f*), to order attachment of the person (*g*), and to appoint a receiver by way of equitable execution (*h*).

Third, as to its jurisdiction in *actions remitted* from the High Court. Where, in any action on contract brought in the High Court, the claim endorsed on the writ does not exceed 100*l.*, either party may at any time apply by summons to a Master in chambers to order the action to be tried in a county court; and the Master *must* make the order, unless there is good cause to the contrary (*i*). If the plaintiff in any action of tort in the High Court has no visible means (*k*) of paying the costs in the event of his failing in the action, the defendant may, whatever be the amount claimed, apply by summons, supported by affidavit (*l*), for an order that, unless the

(*a*) Act of 1888, s. 67; *Angel v. Jay* [1911] 1 K. B. 666.

(*b*) *Turner v. Renmoldson* (1873) L. R. 16 Eq. 37.

(*c*) *Clayton v. Renton* (1867) L. R. 4 Eq. 158.

(*d*) *Wilcox v. Marshall* (1867) L. R. 3 Eq. 270.

(*e*) Judicature Act, 1873, s. 89.

(*f*) *Martin v. Bannister* (1879) 4 Q. B. D. 491; *Brune v. James* [1898] 1 Q. B. 417.

(*g*) *Hymas v. Ogden* [1905] 1 K. B. 246.

(*h*) *R. v. Selfe* [1908] 2 K. B. 121.

(*i*) Act of 1888, s. 65. And see *Scutt v. Freeman* (1877) 2 Q. B. D. 177; *Curtis v. Stovin* (1889) 22 Q. B. D. 513; *Hodgson v. Bell* (1890) 24 Q. B. D. 525; *Dierken v. Philpot* [1901] 2 K. B. 380.

(*k*) *Carey v. Dibley* (1911) 46 I. L. T. 3.

(*l*) *R. v. Stonor* (1883) 50 L. T. 97; *Lea v. Parker* (1885) 13 Q. B. D. 835.

plaintiff give security for the defendant's costs, the action be remitted to a county court (a). The Master has here, however, a judicial discretion whether he will make the order; and will not make it if satisfied that the plaintiff has a cause of action fit to be prosecuted in the High Court (b).

When an order is made remitting the action to a county court, the plaintiff must lodge with the registrar of the county court the order, the writ, and the other documents filed in the action (c); and the action then proceeds in the county court, as if it had been originally commenced there, and will be subject to the County Court Rules (d).

*Interpleader* proceedings instituted in the High Court by a person in possession of money or goods adversely claimed by two or more persons, may also be ordered to be transferred to a county court; where the amount or value of the matter in dispute does not exceed 500*l.*, and the questions at issue may be more conveniently tried in a county court (e). An order may also be made in the Chancery Division, transferring any action therein which a county court has power to try under its equitable jurisdiction (f).

So far we have dealt with the jurisdiction conferred by the County Courts Acts of 1888 and 1903. But the effect of the Judicature Acts has to be considered; for, although

(a) Act of 1888, s. 66; *Burkill v. Thomas* [1892] 1 Q. B. 312.

(b) *Craven v. Smith* (1869) L. R. 4 Ex. 146; *Gray v. West* (1869) L. R. 4 Q. B. 175; *Levi v. Sanderson*, *ibid.* 330; *Sampson v. Mackay*, *ibid.* 643.

(c) Cty. Ct. Rules, Ord. XXXIII. rr. 1 and 2.

(d) *Spring v. Fernandez* [1912] 1 K. B. 294. The jurisdiction of the High Court ceases abso-

lutely (*Duke v. Davis* [1893] 2 Q. B. 260; *D'Errico v. Samuel* [1896] 1 Q. B. 163). But if a question of title to land arises incidentally in the remitted action, the county court has, it would seem, no jurisdiction to try it without consent (*Toon v. Stanbury-Eardley* (1906) 22 T. L. R. 536).

(e) Judicature Act, 1884, s. 17.

(f) Act of 1888, s. 69.

they do not add to the classes of actions which the county courts have jurisdiction to try, they do in a very important way enlarge the powers and duties of the judge of a county court. For the Judicature Act of 1873 (*a*) compels him to grant, in every action which he has jurisdiction to entertain, the same relief and remedy, and give effect to the same legal or equitable grounds of defence, as if the action were tried in the High Court. The Act (*b*) also enables a defendant in any action in a county court to set up by way of counter-claim against the plaintiff any right or claim which he may have against him, whatever its nature may be (*c*). If the counter-claim is for an amount beyond the jurisdiction of the court, the court has full power to give effect to it (*d*); unless the plaintiff has, within two days after receiving notice of the counter-claim, given notice in writing objecting to the jurisdiction. When such objection is taken, the judge can still give effect to the counter-claim up to the amount which the plaintiff is entitled to recover on the claim, and so defeat the plaintiff's claim; leaving the defendant to sue for the balance in a fresh action. The judge may, however, in any case where the counter-claim is beyond the jurisdiction of the court, adjourn the trial of the action to enable either party to apply for its removal to the High Court; or he may give judgment on the claim, and stay execution for such time as may be necessary to enable the defendant to establish his counter-claim by bringing an action in respect of it in the High Court (*e*).

In actions brought under the County Courts Acts, the procedure is regulated by the provisions of the County Courts Acts, 1888 and 1903, and the County Court Rules of 1903 and further Rules from time to time made thereunder.

As regards the choice of the court in which the plaintiff

(*a*) 36 & 37 Vict. c. 66, s. 89.

(*b*) *Ibid.* s. 90.

(*c*) Cty. Ct. Rules, Ord. X.

r. 2.

(*d*) Judicature Act, 1884, s. 18;

Cty. Ct. Rules, Ord. XXII. r. 22.

(*e*) Judicature Act, 1884, s. 18.

is to sue, it is provided that the plaintiff in county court proceedings may bring his action in the court within the district of which the defendant dwells or carries on business (a), or (by leave of the judge or registrar, to be granted or not at his discretion) in the court within the district of which the defendant dwelt or carried on business at any time within six months before the commencement of the action, or (by the like leave) in the court within the district of which the cause of action wholly or in part arose, without regard to the place of residence or business of the defendant (b). But actions relating to land must be brought in the court of the district within which the land is situate (c); and, similarly, actions of replevin in the court of the district in which the goods or cattle are distrained (d).

The plaintiff commences his action by filing a *præcipe*, containing the names of the parties, a short statement of the cause of action, and the amount of the debt or damages claimed; at the same time entering a *plaint* in a book kept by the registrar for the purpose (e). At the time of entering the *plaint*, the plaintiff must also file particulars of his claim; unless it does not exceed 2*l*. Thereupon a *summons* is issued by the registrar, and served on the defendant.

On the day named in the *summons*, the plaintiff must appear to support his claim; and, unless the defendant appears, the plaintiff, on proving his case in court, is entitled to judgment. If the plaintiff has (by leave) issued a *default summons* for any debt or liquidated demand, he may, unless the defendant gives notice of defence within the prescribed period, sign judgment without further proof (f). As a general rule, the defendant

(a) As to the metropolitan districts, see Act of 1888, s. 84.

(b) *Ibid.* s. 74; *Northey Stone Co. v. Gidney* [1894] 1 Q. B. 99; *R. v. Turner* [1897] 1 Q. B. 445.

(c) Act of 1888, ss. 59, 75, 138.

(d) *Ibid.* ss. 133–137.

(e) *Ibid.* s. 73.

(f) *Ibid.* s. 86.

may set up at the trial any ground of defence, without previous notice of it to the plaintiff; but if he intends to rely on any special or statutory defence, such as the defence of infancy, bankruptcy, tender, the Limitation Act, the Statute of Frauds, or any equitable defence, or to set off, or set up by way of counter-claim, any debt or demand against the plaintiff, he must before the trial give notice of it in writing to the registrar, whose duty it is to communicate it to the plaintiff (*a*).

Actions in county courts are usually tried before the judge alone; but, where the amount claimed exceeds 5*l.*, either side may require a jury to be summoned, and, where the amount of the claim is under 5*l.*, the judge may at his discretion, on the application of either of the parties (*b*), order the action to be tried with a jury. The jury consists of eight persons (*c*); and it must be unanimous in its verdict (*d*).

No appeal lies from the finding of any fact by the judge or jury (*e*); but if either party to the action is dissatisfied with the decision or direction of the judge in point of law or equity, or upon the admission or rejection of any evidence, the party dissatisfied may, if the point of law has been taken before the county court judge (but not otherwise (*f*)), appeal to the High Court (*g*). In no case, however (unless by special leave of the judge) is there any right of appeal in an action of contract or tort (other than in ejectment (*h*) or in actions involving title to land), where the debt or damage claimed does not exceed 20*l.*, or in any action of replevin, where the amount

(*a*) Cty. Ct. Rules, O. X., r. 10.

(*b*) Act of 1888, s. 101; and see Cty. Ct. Rules, Ord. XXII. rr. 1, 2, 3.

(*c*) Act of 1903, s. 4.

(*d*) Act of 1888, s. 102.

(*e*) *Cousins v. Lombard Bank* (1876) 1 Ex. D. 404.

(*f*) *Cook v. Gordon* (1892) 61 L. J. Q. B. 445; *Wohlgemuth v. Coste* [1899] 1 Q. B. 501.

(*g*) Act of 1888, s. 120.

(*h*) In which an appeal lies as of right irrespective of the value of the premises. (*Millett v. Ballard* [1904] 2 K. B. 593.)



of the rent or the value of the goods does not exceed 20*l.*, or in any action for the recovery of tenements, where the yearly rent or value does not exceed 20*l.*, or in interpleader proceedings, where the money claimed or the value of the goods does not exceed 20*l.* (*a*). The appeal is brought by notice of motion to a Divisional Court of the King's Bench Division (*b*). An appeal lies from the Divisional Court to the Court of Appeal; provided leave is given by the Divisional Court or by the Court of Appeal (*c*). In every case, whether tried by the judge, with or without a jury, or by the registrar, the county court judge has himself the power, to be judicially exercised, to order a *new trial*, upon such terms as he shall think reasonable (*d*).

A judgment for the payment of money may be enforced by execution against the goods of the judgment debtor (*e*), under a warrant empowering the bailiff of the court to seize and sell sufficient of them to satisfy the amount of the judgment and costs. The judgment may be enforced within the district of another county court (*f*); and may also be executed in Scotland or Ireland, by registering in the corresponding court there a certificate of the judgment (*g*). A judgment for the payment of money may also be enforced by attachment of any debts due to the judgment debtor (*h*). Under the Debtors Act, 1869 (*i*), the judge of the county court has power to commit to prison, for a period not exceeding six weeks, a judgment debtor who, though able to pay the amount of the judgment

(*a*) Act 1888, s. 120.

(*b*) Judicature Act, 1873, s. 45; Ord. LIX. rr. 4–8; and the further rules 9–17, issued in December, 1885; Act of 1888, ss. 121, 122.

(*c*) Judicature Act, 1894, s. 1 (5).

(*d*) Act of 1888, s. 93. And see *Murtagh v. Barry* (1890) 24 Q. B. D. 632; *Brown v. Dean*

[1910] A. C. 373; *Rosin v. Joseph Rank Limited* [1912] 2 K. B. 528.

(*e*) *Ibid.* s. 146; Cty. Ct. Rules, Ord. XXV. r. 1.

(*f*) Act of 1888, s. 158.

(*g*) Inferior Courts (Judgments Extension) Act, 1882.

(*h*) Cty. Ct. Rules, Ord. XXVI.

(*i*) 32 & 33 Vict. c. 62, ss. 5, 10.

debt or the instalments ordered to be paid, fails or refuses to do so. To obtain a committal order, a *judgment summons* must be issued, and be served personally on the debtor; and the burden of proving that the debtor has the means to pay lies on the judgment creditor (*a*). Imprisonment under the order of the Judge does not operate as a satisfaction of the debt; but the debtor may obtain his liberty at any time by paying the sum ordered (*b*). A judgment for the recovery of land or any tenement may be enforced by warrant of possession (*c*). The judge has, as we have said, power to appoint a receiver of an interest in land by way of equitable execution (*d*).

In addition to the jurisdiction conferred by the County Courts Acts, numerous statutes have from time to time been passed since 1846, which give further jurisdiction to county courts in matters of the most varied kind. The jurisdiction so conferred is in some matters concurrent with that of the High Court; in others it is exclusive, and comprises amongst a large variety of matters the following kinds of jurisdiction.

1. *Jurisdiction under the Employers' Liability Act, 1880*.—An action by a workman for personal injuries, or by the representatives of a deceased workman to recover damages from the employer under this Act (*e*), *must* be brought in a county court. The maximum amount of compensation recoverable is three years' wages (*f*).

2. *Jurisdiction under the Workmen's Compensation Act, 1906*.—When any question arises under this Act (*g*), as to the liability to pay compensation, then, unless settled by agreement, it must be settled by arbitration under the Act (*h*). In the absence of agreement between the

(*a*) *Ex parte Koster* (1885) 14 Q. B. D. 597; *Ex parte Fryer* (1886) 17 Q. B. D. 718.

(*b*) Debtors Act, 1869, s. 5; Cty. Ct. Rules, Ord. XXV. r. 49.

(*c*) Cty. Ct. Rules, Ord. XXV. r. 64.

(*d*) *R. v. Selfe* [1908] 2 K. B. 121.

(*e*) 43 & 44 Vict. c. 42, s. 6.

(*f*) *Ibid.* s. 3. (As to this, see *ante*, vol. ii., pp. 368–369.)

(*g*) 6 Edw. 7, c. 58.

(*h*) *Ibid.* s. 1 (3).

parties, the county court judge is the arbitrator to settle any question in dispute in accordance with the provisions of the Act and the Workmen's Compensation Rules made thereunder (a).

3. *Bankruptcy jurisdiction*.—Under the provisions of the Bankruptcy Acts, 1883 to 1913 (b), and the Rules made thereunder, the county court of the district in which the debtor resides or carries on business, other than the London Bankruptcy district, has a wide bankruptcy jurisdiction; in virtue of which it has all the powers of the High Court (c), and may decide any question of law or fact arising in any bankruptcy case (d). In cases arising out of the bankruptcy, there is no limit to such jurisdiction; but the judge may refuse to try cases in which large amounts are involved (e), or, if a difficult question of law arises, he may state a special case for the determination of the question by the High Court. In questions between the trustee in bankruptcy and strangers, the jurisdiction is limited to cases in which the amount in dispute does not exceed 200*l.*; unless all the parties consent (f).

Under the Bankruptcy Act, 1883 (g), the court has also power, where a judgment debtor is unable to pay the amount of the judgment debt, and his whole indebtedness does not exceed 50*l.*, to make an order for the *administration* of his estate, and for the payment of his debts by instalments. To obtain such order, the debtor must file a request and statement, setting out the names and addresses of all his creditors and the amounts of the debts due to them. Notice is then given by the registrar to the creditors, who may attend the hearing of the

(a) Workmen's Compensation Act, 1906, Sch. II. s. 2. (And see *ante*, vol. ii., p. 369.)

(b) 46 & 47 Vict. c. 52; 53 & 54 Vict. c. 71; 3 & 4 Geo. 5, c. 34.

(c) Bankruptcy Act, 1883, s. 100.

(d) *Ibid.* s. 102.

(e) *Re Beswick* (1888) 58 L. T. 591.

(f) Act of 1883, s. 102; *Re Holt* (1888) 58 L. J. Q. B. 5.

(g) S. 122.

debtor's application and prove their debts, if objected to by the debtor or any other creditor ; but all debts set out in the list are, unless objected to, taken as proved. The court may order the debts to be paid in full, or by such composition as appears practicable ; and may order the debts or composition to be paid into court by instalments and distributed by the registrar. The effect of the order is not to divest the debtor of his property, but to make his present and future property subject to the control of the court during the continuance of the order ; and no existing or subsequent creditor can take proceedings during the currency of the administration order, in respect of any debt notified by the debtor, except by leave of the court (a). Any person who becomes a creditor after the date of the order may send in his claim to the registrar, and, on proof of his debt, be scheduled as a creditor ; but he is postponed until those scheduled as creditors before the date of the order have been paid to the extent provided by the order. All sums paid or levied under the order are paid into court, and appropriated, after payment of costs, to payment of dividends from time to time to the creditors whose debts have been admitted or proved. County courts exercising jurisdiction in bankruptcy have also some power in connection with deeds of arrangement (b).

4. *Winding-up jurisdiction*.—Under the Companies (Consolidation) Act, 1908 (c), repealing the Companies (Winding-up) Act, 1890, a county court has power to make an order to wind up a company, whose registered office is within the district of the court, and whose paid-up capital does not exceed 10,000*l*. Proceedings are commenced by petition, and the county court has all the powers of the High Court in such proceedings.

5. *Probate jurisdiction*.—Under the Intestates (Widows

(a) *Pearson v. Wilcock* [1906]  
2 K. B. 440 ; Cty. Ct. Rules,  
Ord. XXV. r. 24 a.

(b) See Bankruptcy Act, 1913,  
ss. 35, 36.  
(c) S. 131.

and Children) Act, 1873 and 1875 (a), the registrar of a county court has power to obtain a grant of letters of administration to the widow or children of a person who has died intestate within the district of the court, leaving estate not more than 100*l.* in value ; if such widow or children reside more than three miles from a Probate Registry. Under the Court of Probate Acts, 1857 and 1858 (b), the judge of a county court has a limited jurisdiction, concurrent with that of the Probate Division, in actions to prove a will in solemn form, or to obtain letters of administration, or to revoke a grant of probate in common form or of letters of administration. To found this jurisdiction, the personal estate of the deceased must be under the value of 200*l.*, and the real estate under the value of 300*l.* (c).

6. *Admiralty jurisdiction*.—By the County Courts (Admiralty Jurisdiction) Acts, 1868 and 1869 (d), and Orders in Council made thereunder, a limited jurisdiction to try the following admiralty actions was conferred upon most county courts which are held in the neighbourhood of the sea ; that is to say :—

- (i) any claim for salvage services rendered to a ship or cargo, where the value of the property saved does not exceed 1000*l.*, or the amount claimed does not exceed 300*l.* (e) ;
- (ii) any claim for towage of a ship, or for necessities supplied to a ship, or for wages earned by any person engaged on a ship, where the amount claimed does not exceed 150*l.* (f) ;
- (iii) any claim, not exceeding 300*l.*, for damage by collision, or for damage to ships, whether by collision or otherwise (g) ;

(a) 36 & 37 Vict. c. 52 ; 38 & 39 Vict. c. 27.

(b) 20 & 21 Vict. c. 77 ; 21 & 22 Vict. c. 95.

(c) Probate Act, 1858, s. 10.

(d) 31 & 32 Vict. c. 71 ; 32 &

33 Vict. c. 51.

(e) Act of 1868, s. 3 (1) ; and see also the Merchant Shipping Act, 1894, ss. 544, 546–549, 556.

(f) Act of 1868, s. 3 (2).

(g) Act of 1868, s. 3 (3) ; Act

- (iv) claims not exceeding 300*l.*, arising out of agreements in relation to the use or hire of any ship, or to the carriage of goods therein, or out of any tort in relation to such goods (a).

The admiralty jurisdiction conferred by the Acts may be exercised either by proceedings *in personam*, or by proceedings *in rem*—that is to say, by arrest of the ship or cargo to which the claim relates (b). The procedure is regulated by the rules contained in Order XXXIX. of the County Court Rules, and is very similar to that in an action in the Admiralty Division of the High Court (c).

The action may be commenced in the court having admiralty jurisdiction within the district in which the vessel or property to which the claim relates is situated at the commencement of the proceedings (d); or, if the foregoing rule is not applicable, in the court having admiralty jurisdiction in the district in which the owner of the vessel or property, or his agent in England, resides; or, if such owner or agent does not reside within any such district, then in the court having admiralty jurisdiction in the district nearest to the place where such owner or agent resides (e). An admiralty action *in personam* may also be commenced in any court having admiralty jurisdiction in which the action could have been brought if it had been a common law action commenced under the County Courts Act, 1888 (f), or which the parties agree in writing shall have jurisdiction (g).

An appeal lies from an admiralty decision of a

of 1869, s. 4. And see *R. v. City of London Court* [1892] 1 Q. B. 273; *The Zeta* [1893] A. C. 468; *The Normandy* [1904] P. 187; *The Upcerne* [1912] P. 160.

(a) Act of 1869, s. 2 (1); *The County of Durham* [1891] P. 1; *Pugsley v. Ropkins* [1892] 2 Q. B. 184; *The Eden* [1892] P. 67; *The City of Agra* [1898] P. 198.

(b) Act of 1869, s. 3.

(c) See *ante*, pp. 660–661.

(d) Act of 1868, s. 21.

(e) *Ibid.* (And see *The County of Durham* [1891] P. 1; *Pugsley v. Ropkins* [1892] 2 Q. B. 184.)

(f) County Courts Act, 1888, s. 74; *The Hero* [1891] P. 294; *Pugsley v. Ropkins*, *ubi sup.*

(g) Act of 1868, s. 21.

county court to a Divisional Court of the Probate, Divorce, and Admiralty Division of the High Court. The appeal may be brought without leave on a question of law under the County Courts Act, 1888, where the amount of the debt or damage claimed is 20*l.* or over (*a*), and on questions of fact, under the County Courts (Admiralty Jurisdiction) Act, 1868, where the amount of the effective claim or judgment exceeds 50*l.*, and security is given for costs (*b*).

(*a*) Act of 1888, s. 120; *The Eden* [1892] P. 67; *The Delano* [1895] P. 40; *The Vulcan* [1898] P. 222.

(*b*) Act of 1868, ss. 26, 27, and

31. And see *The Elizabeth* (1870) L. R. 3 A. & E. 33; *The Forest Queen*, *ibid.* 299; *The Falcon* (1878) 3 P. D. 100; *The Burma* (1899) 80 L. T. 839.

## CHAPTER XVIII.

## OTHER COURTS OF LIMITED OR SPECIAL JURISDICTION.

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IN addition to the county courts, there are, still existing, some tribunals whose powers are restricted either to a particular class of cases, or to cases involving a limited amount of money, or to cases arising within a particular area. We propose to deal very briefly with a few of the more important of these.

I. *Borough Courts*.—Although the establishment and rapid extension of the system of county courts largely superseded such of the ancient local courts as had not already ceased to act, yet a few of the latter have survived in the struggle for existence, and do useful work at the present day. Conspicuous among them are the Lancaster Chancery Court, and the Palatine Court of Durham, of which some account has been given in an earlier chapter (a); and the Liverpool Court of Passage, the Hundred Court of Salford, and the Bristol Tolzey Court. It is difficult, in a general work, to give any satisfactory account of the latter group; owing to the fact that each is governed largely by its own special charters and statutes. But there are a few provisions on the subject which may profitably be noted.

Thus it was provided, by the Small Debts Recovery Act, 1845 (b), that, on the first vacancies which should occur after the passing of that Act, the position of judge of any court for the recovery of small debts should be filled by the appointment of a barrister or special pleader,

(a) See *ante*, pp. 518–519.

(b) 8 & 9 Vict. c. 127, s. 9.



or of an attorney who had practised as such for at least ten years, who should be removable by the Lord Chancellor for incapacity ; and that such judge should be entitled to appoint a deputy similarly qualified, to act for him in case of his unavoidable absence (*a*). And the Municipal Corporations Act, 1882 (*b*), has now added, that the recorder of the borough, where there is one, shall be judge of the court in all cases except where the court is regulated by local Act of Parliament, or where a barrister of five years' standing acted as judge or assessor at the passing of the Municipal Corporations Act, 1835 (*c*).

Again, the Judicature Act, 1873, provided for the enlargement of the jurisdiction of such courts, by empowering the Crown, by Order in Council, to vest in them equity and admiralty jurisdiction (*d*) ; and this liberal policy was affirmed by the Municipal Corporations Act, 1882 (*e*), which enabled the Crown to extend the jurisdiction of any borough civil court over any district within the jurisdiction of the borough quarter sessions, and thus to make the local civil and criminal jurisdiction co-terminous. The same statute (*f*) also empowered the judge of such court to make rules for regulating its procedure. On the other hand, the County Courts Act, 1888 (*g*), empowers the Crown, on the petition of the locality, to exclude the jurisdiction of any local court other than a county court, in any causes whereof the county court has cognisance.

The Boroughs and Local Courts of Record Act, 1872 (*h*), also contains some useful provisions regulating the procedure of such tribunals, many of which are still in force ; more especially those relating to the fees which may be

(*a*) Small Debts Recovery Act, 1845, s. 10.

(*b*) 45 & 46 Vict. c. 50, s. 175.

(*c*) The effect of this provision is to vest the appointment of the judge of a local civil court in the Crown in almost all cases.

(*d*) 36 & 37 Vict. c. 66, s. 88.

(*e*) S. 185.

(*f*) S. 182.

(*g*) S. 7.

(*h*) 35 & 36 Vict. c. 86. And see schedule to the Act.

taken, and the statement of a case for the opinion of a superior court. But, owing to the great utility and activity of the county courts, the other tribunals of small local civil jurisdiction have, with the few exceptions noted above (which are generally regulated by their special Acts of Parliament), sunk greatly in importance. From this statement must, however, be also excepted one conspicuous example, viz., the Mayor's Court of the City of London, of which we now proceed to give an account.

II. *The Mayor's Court* is held at the Guildhall in the City of London, and is one of the most ancient courts in the kingdom. The judges are the Recorder of the City of London, the Common Serjeant, and an assistant judge (a). There are also a registrar and deputy registrar, who, on summons at chambers, have all the powers of a Master of the High Court (b), and a serjeant-at-mace, who, like the sheriff in the High Court, executes the process of the court. The court has a common law and an equitable jurisdiction. It has a common law jurisdiction *concurrent* with that of the High Court, however large the amount in dispute may be, in all actions of contract, tort, or ejectment, where the cause of action arises *wholly* within the limits of the City of London. It has also *exclusive* jurisdiction in claims arising out of indentures of apprenticeship in the City. If any part of the cause of action arises outside of the City, the court has no prescriptive jurisdiction; but by statute (c) it has jurisdiction in claims for debt or damages not exceeding 50*l.*, if the cause of action arose in part within the City, or if the defendant dwelt or carried on business in the City at the time of the commencement of the action, or at some time within six months before action brought (d).

(a) Local Courts of Record Act, 1872, s. 7.

(b) Mayor's Court Rules, 1892, Ord. X. r. 3.

(c) Mayor's Court of London Procedure Act, 1857, s. 12.

(d) *Josolyne v. Roberts* [1908] 2 K. B. 349.

By Orders in Council, power has been given to the court to exercise jurisdiction under the Bills of Exchange Act, 1855, the Arbitration Act, 1889, the Partnership Act, 1890, and other statutes (*a*). The court has an equitable jurisdiction similar to that of the Court of Chancery before the Judicature Acts, in cases where the whole cause of action arises within the City (*b*). Independently, however, of its prescriptive equity jurisdiction, the court has the like power under the Judicature Act, 1873 (*c*), to grant, in every action within its jurisdiction, the same equitable relief or remedy as a judge of the High Court or a county court. Thus, the court has power to grant injunctions and decree specific performance of contracts (*d*), and to give effect to any counter-claim (*e*).

A common law action in the Mayor's Court is commenced by plaint, and an equitable action by bill of complaint. The practice as regards pleading is similar to that in the superior courts before the Judicature Acts, and is regulated by the provisions of the Common Law Procedure Acts (*f*). After entering an appearance, the defendant may demand a *declaration*, in which the plaintiff's solicitor must set out, in the form of certain *common* or *special* counts, a short statement of the cause of action relied on, and the relief or remedy sought. Particulars of the debt or damages claimed must, where necessary, be delivered with the declaration. The plaintiff may demand that the defendant deliver a *plea* to the declaration. A plea is a statement of defence in which the defendant's solicitor sets out, in the form of general or special pleas, the grounds of defence to the counts in the

(*a*) Common Law Procedure Act, 1852; Local Courts of Record Act, 1872.

(*b*) *R. v. London Corporation* (1892) 61 L. J. Q. B. 329; *Bowler v. Barberton* [1897] 1 Q. B. 164.

(*c*) S. 89.

(*d*) *McGregor v. McGregor* (1888) 57 L. J. Q. B. 268.

(*e*) Judicature Act, 1873, s. 24 (3), and s. 90; Judicature Act, 1884, s. 18.

(*f*) 15 & 16 Vict. (1852) c. 76; 17 & 18 Vict. (1854) c. 125; 23 & 24 Vict. (1860) c. 126.

declaration. The defendant may then demand that the plaintiff deliver a *replication*, which is a reply to the defence; but, if no replication is demanded, or when the pleadings are closed, the plaintiff may set the cause down for trial.

Formerly, where a declaration disclosed no cause of action, or a plea disclosed no defence, objection was taken by *demurrer*; and the court decided the question of the sufficiency of the declaration or the plea, as the case might be, on the assumption that the facts therein alleged were true. In 1892 (*a*), however, proceedings by demurrer were abolished; and objections in point of law are now dealt with in the same way as in the High Court (*b*).

An action in the Mayor's Court is usually tried with a jury; but, with the written consent of the parties, the decision of any issue of fact may be left to the judge without a jury (*c*), in which case the verdict of the judge has the same effect as the verdict of a jury, except that it cannot be questioned on the ground of being against the weight of the evidence. Where the action is tried with a jury, the judge has no power to enter judgment contrary to the findings of the jury. But he may order a new trial.

The rules as to costs in the Mayor's Court are similar to those in the High Court (*d*). Either party may, if dissatisfied with the result of the trial, apply in the Mayor's Court for a new trial (*e*), on the ground that the verdict of the jury is against the weight of the evidence; or he may appeal to the Divisional Court on a question of law or evidence where the amount of the claim exceeds 20*l.* (*f*), or with leave where the amount does not exceed 20*l.* The appellant must give security

(*a*) Mayor's Court Rules, 1892,  
Ord. IV.

(*b*) See *ante*, p. 551.

(*c*) Mayor's Court Act, 1857,  
s. 51; Common Law Procedure  
Act, 1854, s. 1.

(*d*) Mayor's Court Rules, 1892,  
Ord. VIII.

(*e*) Mayor's Court Act, 1857,  
s. 22.

(*f*) *Ibid.* s. 8.

for the costs of the appeal ; unless the judge gives leave to appeal (a).

[III. *The Courts of the Universities of Oxford and Cambridge.*—These are courts subsisting under antient charters granted to these universities, and confirmed by Act of Parliament ; and they have an exclusive jurisdiction in (*inter alia*) actions of a civil nature in which any member or servant of the university is a party, at least in every case where the cause of action arises within the liberties of the university, and the member or servant was resident in the university when it arose (b). The most antient charter containing this grant to the university of Oxford, was 28 Hen. III. (A.D. 1244) ; and the privileges thereby granted were confirmed and enlarged by almost every succeeding prince, down to King Henry the Eighth, in the fourteenth year of whose reign (A.D. 1523) the largest and most extensive charter of all was granted. This last-mentioned charter is the charter now governing the privileges of that university ; and a charter, somewhat similar to that of Oxford, was afterwards granted to Cambridge, in the third year of Queen Elizabeth (1561). The statute of 13 Eliz. (1571) c. 29, which subsequently recognised and confirmed *all* the charters of these two universities, and those of the 14 Hen. VIII. (for Oxford) and 3 Eliz. (for Cambridge) by name, fully established the civil privileges of these universities.] It is to be observed, however, that the privilege can be claimed only on behalf of members who are defendants ; and when an action in the High Court is brought against such member, the university enters a *claim of consuance*, that is, claims the cognisance of the matter, whereupon the action is withdrawn from the

(a) Mayor's Court Act, 1857, s. 10. And see *Green v. Isaacs* (1907) 96 L. T. 122. *Renouard* (1810) 12 East, 12 ; *Thornton v. Ford* (1812) 15 East, 634 ; *Turner v. Bates* (1847) 10

(b) 4 Inst. 227 ; *Browne v. Q. B.* 292.

High Court and transferred to the university court (a). But as regards the university of Cambridge, the privilege is, *semble*, no longer exclusive (b). The procedure in the university courts is, for the most part, regulated according to the laws of the civilians ; but is subject to any specific rules made by the Vice-Chancellor of the University with the approval of three of His Majesty's Judges. And, as regards appeals, the procedure thereon is like that on appeals from other inferior courts ; the appeal being to a Divisional Court of the High Court of Justice (c).

IV. *The Ecclesiastical Courts*.—These courts, as has previously been remarked, had jurisdiction in testamentary and matrimonial causes until 1857 ; when, by the Court of Probate Act, and the Matrimonial Causes Act, their jurisdiction in these matters was transferred to and vested in the Court of Probate and the Court for Matrimonial Causes, two purely secular tribunals, which are now represented in the Probate, Divorce, and Admiralty Division of the High Court.

But in ecclesiastical matters the following ecclesiastical courts have retained their jurisdiction : (1) the court of the archdeacon ; (2) the court of the bishop, otherwise called the consistory court ; (3) the provincial court of the archbishop ; (4) the Judicial Committee of the Privy Council.

1. The court of the archdeacon, which holds the lowest place in the ecclesiastical polity, is held, in each archdeaconry, before a judge appointed by the archdeacon himself, and called his official ; and the jurisdiction of

(a) *Ginnett v. Whittingham* (1885) 16 Q. B. D. 761.

(b) 19 & 20 Vict. (1856) c. xvii. s. 18.

(c) See (as to Oxford) Oxford University Act, 1862 (25 & 26 Vict. c. 26), s. 12 ; and Rules of March 21, 1892, and Order in Council of 23rd August, 1894. See also (as to both Universities)

Judicature Act, 1894, s. 1 (5) ; and (as to Cambridge) the 57 & 58 Vict. c. lx. (the Cambridge University and Corporation Act, 1894). The criminal jurisdiction of the university courts will be found described in bk. vi. ch. x., *post*, vol. iv., pp. 263–265.

this court extends to and comprises all ecclesiastical causes arising within the archdeaconry. But the litigant may, as a general rule, commence his suit either in this court or in that of the bishop; though, in some archdeaconries, the suit must be commenced in the former, to the exclusion of the latter (*a*). From the archdeacon's court an appeal lies, in general, to that of the bishop, by virtue of the 24 Hen. VIII. (1532) c. 12, commonly called the First Act of Appeals.

2. The bishop's court (otherwise called the consistory court) is held in the several dioceses, for the trial of all ecclesiastical causes arising within the diocese (*b*). To this court have been specially assigned all proceedings instituted against clerks (for immorality and the like) under the Clergy Discipline Act, 1892 (*c*). The chancellor of the diocese (or his commissary) is the judge; and, under the 24 Hen. VIII. (1532) c. 12, an appeal lies from this court to the provincial court of the archbishop, save as regards proceedings under the Clergy Discipline Act, 1892, the appeal in which is (at the option of the appellant) either to the provincial court or to the Judicial Committee, and is confined (unless special leave is given) to questions of law (*d*).

3. The provincial court of the archbishop.—The provincial court of the Archbishop of Canterbury, which used to be called the Court of Arches, and the provincial court of the Archbishop of York, which used to be called the Chancery Court of York, were united by the Public Worship Regulation Act, 1874 (*e*), which provided, that

(*a*) *Woodward v. Fox* (1691) 2 Vent. 267; Godolph. 61.

(*b*) See *R. v. Tristram* [1902] 1 K. B. 816, where the chancellor's jurisdiction was decided to be conditional on his consulting and getting the consent of the bishop; and, the condition not having been complied with, prohibition was granted.

(*c*) 55 & 56 Vict. c. 32, s. 2; *Lee v. Flack* [1896] P. 138; *Girt v. Fillingham* [1901] P. 176; *Sweet v. Ely* [1902] 2 Ch. 508; *Sweet v. Young* [1902] P. 37 (see *ante*, vol. ii., pp. 763–765).

(*d*) Clergy Discipline Act, 1892, s. 4.

(*e*) 37 & 38 Vict. c. 85.

the two archbishops might (subject to the approval of the Crown) appoint “a judge of the provincial courts “ of Canterbury and York,” and that all proceedings taken before him should be deemed to be taken in the Arches Court of Canterbury or the Chancery Court of York, as the case might require. The proper jurisdiction of the court is to determine appeals from the sentence of all inferior ecclesiastical courts within either province ; but original suits may also be brought therein, *i.e.*, suits the cognisance of which belongs properly to the inferior jurisdictions within the province, in respect of which the inferior judge has waived his jurisdiction (*a*).

4. The Judicial Committee of the Privy Council.—Appeals from the archbishops’ courts lay before 1832 to the Court of Delegates (*b*) ; but since that year all appeals from ecclesiastical courts are referred for decision to the Judicial Committee of the Privy Council (*c*), and provision is made for the appointment of certain of the archbishops and bishops to attend as assessors of the Judicial Committee on the hearing of such appeals (*d*).

The injuries of a pecuniary character that are cognisable in the different ecclesiastical courts, are, or were, (1) the subtraction of tithes or non-payment of ecclesiastical dues ; (2) the spoliation of benefices ; and (3) dilapidations.

(1) *The subtraction of tithes, or non-payment of ecclesiastical dues.*—Before the Tithe Commutation Acts, the ecclesiastical courts had a limited jurisdiction to enforce the payment of tithes or ecclesiastical dues ; but in most

(*a*) *Burgoynne v. Free* (1825) 2 Addams, Ecc. Rep. 406 ; *Ex parte Denison* (1854) 4 El. & Bl. 292. (See *ante*, vol. ii., pp. 765–766.)

(*b*) In virtue of 25 Hen. 8 (1534) c. 19, which authorised all appeals to be brought to the Crown in Chancery.

(*c*) Privy Councils Appeals Act, 1832 ; Judicial Committee Act, 1833, s. 3 ; Judicial Committee Act, 1843, s. 11 ; Judicial Committee Act, 1844, ss. 9, 12 ; *Gorham v. Bishop of Exeter* (1850) 15 Q. B. 52.

(*d*) Appellate Jurisdiction Act 1876, s. 14.



parishes tithes have been commuted into a rent-charge recoverable by distress or by the appointment of a receiver under the Tithe Act, 1891. It would seem, however, that other ecclesiastical dues, where they are recoverable at all, are still recoverable in the ecclesiastical courts ; unless the amount claimed is less than ten pounds, when they are recoverable before magistrates in a summary way (a).

[(2) *Spoliation of benefices*.—Spoliation is an injury done by one clerk or incumbent to another, in taking the fruits of his benefice under a pretended title and without any right thereto ; and this injury is remedied by a decree to account for the profits so taken. When the *jus patronatus* (or right of advowson) doth not itself come into debate, this injury is cognisable in the spiritual court. But if the right of patronage itself comes at all into dispute, the ecclesiastical court hath no cognisance, provided the profits sued for amount to a fourth part of the value of the living ; but may be prohibited, at the instance of either patron, by the writ of *indicavit* (b). And if a clerk, without any colour of title, ejects another from his parsonage, this injury also must be redressed in the temporal courts ; for it depends upon no question determinable by the spiritual law, such as vacancy or no vacancy, but is merely a civil injury.

(3) *Dilapidations*.—These are a kind of ecclesiastical waste to the chancel or to the parsonage-house and the buildings belonging thereto. The waste may be either voluntary, by pulling down, or permissive, by suffering to decay (c) ; and for each species of waste

(a) 5 & 6 W. 4, c. 74 ; 4 & 5 Vict. c. 36.

(b) See 13 Edw. 1 (*Circ. aga.*) ; *Artic. Cleri*, 9 Edw. 2 (1314) st. 1, c. 2 ; F. N. B. 45.

(c) See also 13 Eliz. (1571) c. 10, as to a spiritual person making over his goods with intent to defeat his successor of his remedy for dilapidations.

[an action will lie either in the spiritual court or in the temporal court (a). The action may be brought by the successor against the predecessor (if living), or against his legal personal representatives (if dead);] but the proceedings in respect of dilapidations are now taken, in general, under the Ecclesiastical Dilapidations Acts, 1871 and 1872 (b).

The rules administered and the procedure followed in the ecclesiastical courts are for the most part based upon the civil and canon laws.

[The ordinary procedure is as follows. There is a first *citation*, to call the party injuring before them; and then, second, a *libel*, or articles drawn out in a formal *allegation*, setting forth the complainant's ground of complaint. To this the defendant delivers an *answer* on oath; and if he denies or extenuates the charge, the plaintiff proceeds to *proofs* (c). If the defendant has any circumstances to offer in his defence, he must propound them in a *defensive allegation*; and then there is the plaintiff's *answer* upon oath, and the defendant may then proceed to proofs (d).] The court may summon

(a) *Jones v. Hill* (1690) Cart. 224; *S. C.* 3 Lev. 268; *Morley v. Leacroft* [1896] P. 92; *Neville v. Kirby* [1898] P. 160.

(b) 34 & 35 Vict. c. 43; 35 & 36 Vict. c. 96.

(c) In former times, when a clergyman was cited to appear before the bishop or ecclesiastical court for alleged misconduct, he might have been required to make answer on the oath of himself and his *compurgators*; which latter persons were certain of his neighbours able to swear that they believed him innocent of the charge. And this *ex officio* oath (as it was called), although prohibited generally to laymen,

was yet continued, as regarded the clergy, till the middle of the seventeenth century, when it was abolished by the 13 Car. 2 (1661) st. 1, c. 12. (*Report of Commissioners on Ecclesiastical Courts*, 15 Feb. 1832, p. 55.)

(d) In Brice, *Law Relating to Public Worship* (chap. iv.), it is pointed out, that there is a difference in the proceedings, according as the suit is civil or criminal. In a civil suit, they are said to commence with a *citation*, *decree*, *monition*, or *act on petition*; and then come the *libel*, the *litis contestatio*, and the *pleas* and *answers*. In criminal suits, the first plea is termed the

witnesses, and examine them, by word of mouth or affidavit (*a*) ; and, when all the pleadings and proofs are concluded, they are referred to the consideration of the judge, who, after hearing advocates on both sides, forms his *interlocutory decree* or *definite sentence* at his own discretion.

The ecclesiastical courts have power to pronounce (among other sentences) sentence of *suspension* (*b*), and even sentence of *deprivation*, in the case of suits against beneficed incumbents (*c*) ; and also sentence of *excommunication*, for offences falling under ecclesiastical cognisance. But as regards the sentence of excommunication, it was provided by the Ecclesiastical Courts Act, 1813, that no person should incur, by the sentence of excommunication, any penalty or incapacity whatever, except such imprisonment, not exceeding six months, as the ecclesiastical court may have power to direct (*d*).

V. *The Courts of the Commissioners of Sewers*.—Under various Sewers Acts (*e*), commissioners are appointed in particular localities with jurisdiction as to banks of the sea coast, and navigable rivers and streams, in virtue of which they may make orders for the removal of any annoyances, or for the safeguard and conservation of the sewers within their commission (*f*), and may also

*articles*, nominally brought under the sanction and in the name of some bishop, whose ‘office’ is thus said ‘to be promoted’ ; and the articles must not be inconsistent with, or beyond, the citation.

(*a*) Evidence Act, 1851, s. 2 ; Ecclesiastical Courts Act, 1854.

(*b*) Suspension may be either *ab officio* merely, or *ab officio et beneficio* (Brice, *Public Worship*, p. 280).

(*c*) *Martin v. Mackonochie* (No. 1) (1878) 3 Q. B. D. 730 ; 4 Q. B.

D. 697 ; L. R. 6 App. Ca. 424 ; *Martin v. Mackonochie* (No. 2) (1881) 6 P. D. 87 ; 7 P. D. 94 ; and 8 P. D. 191 ; *Dean v. Green* (1882) 8 P. D. 79.

(*d*) S. 3.

(*e*) 23 Hen. 8 (1531) c. 5 ; 13 Eliz. (1571) c. 9 ; Sewers Acts, 1833, 1841, and 1849.

(*f*) As to Romney-marsh, in the county of Kent, see *New Romney (Mayor, etc.) v. New Romney Commissioners* [1892] 1 Q. B. 840.

assess and enforce payment of such rates upon the owners of lands within their districts as they shall judge necessary (a).

VI. *Courts martial*.—Martial law has now no place in the institutions of this country, except under the articles of war established under the Army Act (b), and the annual Act which continues in force yearly the provisions of that Act. All offences, cognisable under these articles of war, are tried before the *courts martial* which are from time to time constituted, as the occasion requires and as is provided by the Act; and no appeal lies from the decision of a court martial, but the matter comes before the commander-in-chief of the forces, as representing the King. There are, however, securities against the excessive and improper exercise of the jurisdiction of courts martial in the writs of *prohibition*, *certiorari*, and *habeas corpus* (c).

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| <p>(a) 23 Hen. 8 (1531) c. 5; Sewers Acts, 1833, 1841, 1849, ss. 2, 7; <i>Griffiths v. Longdon Drainage Board</i> (1871) L. R. 6 Q. B. 738; <i>R. v. Commissioners for Essex</i> (1885) 14 Q. B. D. 561; <i>R. v. Selby Dam Drainage Com-</i></p> | <p><i>missioners</i> (1892) 61 L. J. Q. B. 372.</p> <p>(b) As to this statute, see <i>ante</i>, vol. ii., pp. 690–694.</p> <p>(c) Anson, <i>Law and Custom of the Constitution</i> (3rd edn.), vol. ii., part ii., p. 186.</p> |
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## CHAPTER XIX.

## OF PREROGATIVE WRITS.

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THE principal prerogative writs are—(1) the writ of *habeas corpus*; (2) the writ of *mandamus*; (3) the writ of *quo warranto*; (4) the writ of *prohibition*; (5) the writ of *certiorari*; and (6) the writ of *procedendo*. We shall shortly consider each of these six writs. They are so called, because they not only (like all other writs) issue in the name of the Crown, but because they are chiefly used to safeguard the rights of the Crown, and can, therefore, only be obtained by special permission of a court of justice.

(1) *The writ of habeas corpus*.—This is the prerogative remedy which the law has provided against violations of the right of personal liberty; because liberty is not absolutely secure unless a person who is kept in confinement without legal justification, has, in addition to his remedy by action for false imprisonment, a means of being set free from his confinement.

The right to personal freedom is absolutely secured by the writ of *habeas corpus ad subjiciendum*. This is a writ directed to any person who detains another in custody; and it commands him to have the body of the person detained produced before the court, with the day and cause of his being taken and detained, so that the court may inquire into the cause of his detention, and if it is unlawful, at once set him free. The writ is most commonly issued out of the King's Bench Division, upon motion for an order absolute or *nisi*, or by any judge of the High Court

during vacation (*a*), and may be applied for by the person detained, or by any one on his behalf (*b*). It will always be issued on showing by affidavit a *prima facie* case that the person on whose behalf it is asked is being unlawfully deprived of his liberty (*c*). Disobedience to the writ is punishable by fine or imprisonment for contempt of court, and, in many cases, exposes the offender to heavy penalties recoverable by the person injured. According to circumstances, the writ may be sought at common law or under the Habeas Corpus Acts (*d*); but in nearly all cases a common law writ is sought, for the Habeas Corpus Acts only made more effective the common law writ, and improved the procedure by which writs could be obtained, and checked the devices by which their effect could be evaded. The writ may be enforced in any part of the dominions of the Crown; but it has been provided, by the Habeas Corpus Act, 1862 (*e*), that no writ of *habeas corpus* shall issue out of England into any colony or foreign dominion of the Crown, in which there is a lawful established court with authority to grant and issue such writ, and with power to ensure its due execution throughout such colony or dominion (*f*).

There are various other kinds of writs of *habeas corpus*; but they are not of great practical importance, since changes of procedure and practice have provided other and more simple means of attaining similar results (*g*).

(2) *The writ of mandamus*.—The power of issuing this

(*a*) Crown Office Rules, 1906, rr. 216–218; *Ex parte Lees* (1858) E. B. & E. 828. It will not be granted for a prisoner detained in execution after conviction on indictment.

(*b*) In the case of infants, proceedings are usually in chambers, on summons.

(*c*) *Hobhouse's Case* (1820) 3 B. & Alc. 420.

(*d*) 31 Car. II. c. 2; 56 Geo. III. c. 100. And see Crown Office Rules, 1906, rr. 216–227.

(*e*) 25 Vict. c. 20, s. 1.

(*f*) *Ex parte Anderson* (1861) 30 L. J. Q. B. 129; *Ex parte Brown* (1864) 33 L. J. Q. B. 193; *R. v. Crewe* [1910] 2 K. B. 576.

(*g*) See Crown Office Rules, 1906, rr. 228–230.

writ belongs exclusively to the King's Bench Division (a). In its form, it is a command issuing in the King's name, and directed to any person, corporation, or inferior court, within the King's dominions, requiring him or them to do some particular thing therein specified which appertains to his or their office and duty. Its application is generally confined to cases where relief is required in respect of the infringement of some legal or quasi-legal duty of a public nature (b), and adequate legal remedy by an action or other means is unattainable (c). Among other cases, the writ may be granted to compel the admission or restoration of the applicant to any office of a public nature, whether spiritual or temporal, to academical degrees, to the use of a meeting-house, or the like; and it may also be granted for the production, inspection, or delivery of public books and papers, or to oblige bodies corporate to affix their common seal, or to compel the holding of a court, or the holding of an election to corporate and other public offices (d). But the writ would be refused where there is no legal duty to the applicant; as, for example, where it was sought to compel the Secretary of State for War to conform to the terms of a Royal Warrant as to the pay of military officers, and the only duty was therefore to the Crown and not to the applicant (e).

An application for a writ of *mandamus* may be made, but only by counsel, to a Divisional Court on motion (f)

(a) Judicature Act, 1873, s. 34; Ord. LIII. r. 5; Crown Office Rules, 1906, rr. 49–69.

(b) *R. v. Barker* (1762) 3 Burr. 1267.

(c) *R. v. Leicester Union* [1899] 2 Q. B. 632; *R. v. Archbishop of Canterbury* (1812) 15 East, p. 136. It is no objection to granting a *mandamus*, that the party against whom the complaint is made may be proceeded against by *indictment* (*R. v. Severn Rail. Co.* (1819) 2 B. &

Ald. 646); but the existence of a specific and adequate civil remedy is an objection to the issue of a *mandamus* (*In re Nathan* (1884) 12 Q. B. D. 461; *R. v. Registrar of Joint Stock Companies* (1888) 21 Q. B. D. 131).

(d) *R. v. Norwich* (1830) 1 B. & Ad. 310.

(e) *R. v. Sec. of State for War* [1891] 2 Q. B. 326.

(f) Crown Office Rules, 1906, r. 49.

supported by affidavit ; and, if a good *prima facie* ground is shown for granting it, the court usually makes a rule *nisi* directing the party complained of to show cause why a writ of *mandamus* should not issue. Notice of this order *nisi* is directed to be served on every person who, in the opinion of the court, ought to have notice of it (a). Any person affected may show cause against the issue of the writ ; but if cause is shown for the issue thereof, the order *nisi* will be made absolute, though at first in the alternative, either to do the thing commanded or else to signify some reason to the contrary, to which a *return* or answer must be made at a certain day. If the person to whom the writ is directed makes no return, he is punishable for his contempt by attachment ; and if he makes a return, and it be found either insufficient in law or false in fact, there then issues in the second place a *peremptory mandamus* to do the thing absolutely, to which no other return will be admitted, except a certificate of perfect obedience to, and compliance with, the writ (b).

Where a judge, magistrate, or officer of an inferior court improperly refuses or omits to exercise, jurisdiction which he ought to exercise, the remedy is by writ of *mandamus*, or, in case of a judge or officer of a county court, by an order (c) having the effect of a writ of *mandamus*, which is obtainable on motion in a Divisional Court ; for it is the peculiar business of the King's Bench Division to superintend inferior tribunals, and to compel them, where necessary, to exercise those judicial or ministerial powers with which they have been invested (d).

There must be distinguished from the prerogative writ the *action of mandamus* created by the Common Law Procedure Act, 1854 (e), which is in the nature of an

(a) Crown Office Rules, 1906, rr. 50, 51.

(b) *Ibid.* r. 61.

(c) County Courts Act, 1888, s. 131. Cf. Justices Protection Act, 1848, s. 5.

(d) *R. v. Cotham* [1898] 1 Q. B. 802. But where jurisdiction has exercised *improperly* the proper remedy is by appeal.

(e) Ord. LIII., replacing the Common Law Procedure Act.



action for specific performance (a). The plaintiff in any action may indorse upon his writ of summons a notice that he intends to claim a *mandamus*, or order commanding the defendant to perform some duty of a public or quasi-public character, in which the plaintiff is interested, and to enforce which there is no other convenient remedy (b); and the judgment in the action may command the defendant to perform the duty in question. In case of disobedience, the defendant may be attached, or the court may direct the act to be done by the plaintiff, or by some person appointed for the purpose by the court, at the expense of the defendant; as, for example, when the act required by the judgment of the court to be done is the execution of any conveyance, contract, or other document.

(3) *The writ of quo warranto*.—[The prerogative writ of *quo warranto*, which is now obsolete, was in the nature of a writ of right for the Crown, against him who claimed or usurped any office or franchise, to inquire, in order to determine the right, by what authority he supported his claim (c). It lay also in case of non-user of a franchise, or mis-user or abuser of it, commanding the defendant to show by what warrant he exercised the franchise, having never had any grant of it, or else having forfeited it by neglect or abuse. Under the modern practice, an information in the nature of a *quo warranto* (d) may be issued out of the King's Bench Division (e) on *information* filed by the Attorney-General; and this is properly a proceeding to punish the usurper by a fine, for the usurpation of the

(a) *Smith v. Chorley District Council* [1897] 1 Q. B., at p. 539.

(b) *Benson v. Paull* (1856) 6 E. & B. 273; *Bush v. Beavan* (1862) 1 H. & C. 500; *R. v. L. & N. W. Rail. Co.* [1894] 2 Q. B. 512; *Peebles v. Oswaldtwistle Urban Council* [1897] 1 Q. B. 625;

*Smith v. Chorley District Council*, *ibid.* 532 and 678; *Davies v. Gas Light and Coke Co.* [1909] 1 Ch. 708.

(c) *Finch*, L. 322; 2 Inst. 282.

(d) Crown Office Rules, 1906, rr. 40-48.

(e) Judicature Act, 1873, s. 34; Crown Office Rules, r. 40.

[franchise, as well as to oust him or seize it for the Crown. It may also be issued at the suit of a private individual as *relator*, with leave obtained on motion, for the purpose of trying the right of another to hold or exercise the privileges of an office (a).]

Under the Municipal Offices Act, 1710, an information in the nature of a *quo warranto* may be brought, with leave of the court (b), at the *relation* or instigation of any person, who is then called the *relator* (c), against any person unlawfully holding any office in any city, borough, or corporate town (d), for the purpose of obtaining judgment ousting him from office (e).]

As regards such proceedings, it has been provided, by the Municipal Corporations Act, 1882, that every application for the purpose of calling upon a person to show by what warrant he claims to exercise the office of mayor, alderman, or burgess, in any borough within the Municipal Corporations Act, must be made before the end of twelve months from the election of the defendant, or from the time when he shall become disqualified; and that no election of a mayor shall be liable to be questioned, by reason of a defect in his title to the office of alderman or councillor to which he may have been previously elected, unless, within twelve months after his election, a rule shall have been applied for, calling upon him to show cause by what warrant he claimed to exercise such office; and that every election to the office of mayor, alderman, councillor,

(a) An information *quo warranto* to try the title to an office which has determined, will not be granted (*Re Harris* (1837) 6 A. & E. 475); nor will that process be granted for a mere irregularity in an election not affecting the result (*R. v. Ward* (1873) L. R. 8 Q. B. 210).

(b) 9 Ann. c. 25, s. 4; *R. v. Parry* (1837) 6 A. & E. 810.

(c) The relator must swear an

affidavit, to the effect that he is relator (Crown Office Rules, 1906, r. 43; *R. v. Hedges* (1840) 11 A. & E. 163; *R. v. Greene* (1842) 2 Q. B. 460).

(d) An information *quo warranto* can only be brought against a body of persons assuming to act as a corporation, by the Attorney-General (*R. v. White* (1836) 5 A. & E. 613).

(e) 9 Ann. c. 25, s. 5.

or other corporate office, within any such borough, which shall not have been called in question within twelve months after such election, shall be deemed good and valid (a).

(4) *The writ of prohibition*.—This writ may be directed to the judge and any party to a suit in any inferior court, commanding them to cease from the prosecution thereof, on the ground that the suit is not within its jurisdiction (b). An application in civil proceedings in the King's Bench Division for a writ of prohibition is made to a Divisional Court by motion, or to a judge in chambers by summons (c). Applications for prohibition to a county court or other inferior court in civil cases are made to a judge in chambers, on first obtaining, on *ex parte* application, leave to issue the summons. If the summons is granted and the application successful, the writ is issued, in pursuance of the judge's order, at the Crown office (d). If, after a prohibition has been granted, either the judge of the court below, or any party to the cause or proceeding pending therein, proceeds in disobedience to it, an attachment may be had against him to punish him for contempt; and an action for damages will also lie at the suit of the injured party.

(5) *The writ of certiorari*.—This writ issues from the High Court to the judge or officers of any inferior court of record, for the purpose of removing proceedings pending therein to the High Court (e). The writ may be had not only in civil but in criminal cases; but the consideration of the writ of certiorari in its relation to criminal cases belongs more properly to the next Book of

(a) 45 & 46 Vict. c. 50, ss. 73, 70.  
225.

(b) *Re Dean of York* (1841) 2 Q. B. 1; *R. v. Lincolnshire County Court Judge* (1887) 20 Q. B. D. 167.

(c) Crown Office Rules, 1906,

r. 70.  
(d) Crown Office Rules, 1906, rr. 70, 71, and County Courts Act, 1888, ss. 127–132.

(e) *Bac. Abr. Certiorari* A; *Ex parte Phillips* (1835) 2 A. & E. 586.

these Commentaries, where it will, accordingly, be found noticed (a); and our attention is at present called to the writ in its relation to civil cases only. Where civil proceedings are pending in any inferior court, a defendant may apply for a writ of *certiorari*, on the ground that the matter is one more proper to be disposed of in the High Court; or that it is to be tried by a jury, and that no impartial jury can be obtained in the inferior court; or that difficult questions of law are likely to arise on the trial (b). The applicant must satisfy the High Court that it is desirable that the matter should be heard in the High Court. The vast majority of civil proceedings in inferior courts are commenced in county courts; and any proceedings commenced in a county court under the County Courts Acts (c) may be removed to the High Court (d) by a writ of *certiorari* or by order (e), if the defendant can satisfy the High Court that the matter is more fit to be heard in the High Court; but the High Court may impose terms as to payment of costs, giving security, and other matters (f). The most usual ground is, that difficult questions of law are likely to arise on the trial of a case of some importance (g). In an action of replevin, the defendant has a right to remove the case, on giving the required security (h).

The application for leave to issue the writ is usually made in the King's Bench Division on summons before a Master in chambers, or in the Chancery Division to a

(a) See *post*, bk. vi., ch. xv. s. 126.  
(vol. iv., pp. 323–327).

(b) Where the inferior court has no jurisdiction, or is exceeding its jurisdiction, the proper remedy is by writ of *prohibition*.

(c) County Courts Acts, 1888, 1903.

(d) Application may be made to the appropriate division of the High Court.

(e) County Courts Act, 1888,

(f) But where a defendant has procured the removal by *certiorari* of the matter to the High Court, the plaintiff cannot be compelled to proceed with the action there (*Harrison v. Bull* [1912] 1 K. B. 612).

(g) *Potter v. G. W. Colliery Co.* (1894) 10 T. L. R. 380.

(h) County Courts Act, 1888, s. 137. (See *ante*, p. 674.)

judge on motion or originating summons (a). The application may often be made *ex parte*; and the order will often be made absolute in the first instance.

(6) *Writ of procedendo*.—Where a writ of *certiorari* has issued improvidently, as for instance, where it does not lie at all, or is misdirected, or is otherwise bad in law, and also where a defendant has procured the issue of a writ of *certiorari*, but does not take the proper further steps in the proceedings in the High Court (b), a writ of *procedendo* may be awarded to restore the action to the Court from which it was removed (c); and a cause so sent back may never again be removed before final judgment (d).

(a) R. S. C. Ord. LII.

(c) *Jones v. Davies* (1822) 1

(b) *Blanchard v. De la Crouée* B. & C. 143.

(1847) 9 Q. B. 869.

(d) 21 Jac. (1623) c. 23, s. 3.



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